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EMPLOYERS AND EMPLOYED.

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MDCCCLXXXVII.

# EMPLOYERS AND EMPLOYED:

BEING

- (1) AN EXPOSITION OF THE LAW OF REPARATION FOR PHYSICAL INJURY;
- (2) THE EMPLOYERS' LIABILITY ACT (1880) ANNOTATED WITH SPECIAL REFERENCE TO DECISIONS IN ENGLAND AND SCOTLAND; AND
- (3) SUGGESTED AMENDMENTS OF THE LAW AS TO THE LIABILITY OF EMPLOYERS.

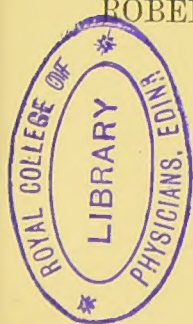
*With Appendices and Indices.*

BY

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AND

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*Advocate.*



GLASGOW :

JAMES MACLEHOSE AND SONS,

*Publishers to the University.*


1887.





TO THE  
RIGHT HON. JOHN INGLIS, D.C.L., LL.D.,  
LORD JUSTICE-GENERAL AND LORD PRESIDENT OF THE  
COURT OF SESSION,

This Volume is Enscribed,  
IN RESPECTFUL RECOGNITION NOT ONLY OF HIS PRE-EMINENT  
ATTAINMENTS AS A JURIST, BUT ALSO OF THE PRIDE AND  
SATISFACTION FELT BY HIS BROTHER SCOTCHMEN  
IN HIM AS A COMMANDING EXPONENT OF THE  
PRINCIPLES, RIGHTS, AND ADVANTAGES  
OF OUR NATIONAL SYSTEM OF  
JURISPRUDENCE.



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## PREFATORY NOTE.

THIS work is a somewhat novel attempt to combine in one volume what is hoped may be of some use to four divisions of the community. The authors proceed upon the assumption that the liability of employers is a subject of great importance to employers of labour, to those employed, to the legal profession, and to those who regard the questions involved from a legislative stand-point. Although written by Scotch lawyers, the different questions emerging with reference to the liability of employers are treated from views suggested by a consideration of the common law and case law of England as well as of Scotland.

It is believed that the first three parts of this work are written in language which may be understood by any intelligent man, and with this object non-technical language is used, and well-known legal expressions and maxims are explained in a way which would be impertinent and absurd were the volume designed for the legal profession alone.

At the same time, as it is hoped that the most recent case-law has been investigated, the grounds of judgment set forth, the principles on which these rest explained, as also that the subject of employers' liability

has so far been historically treated, it is intended that these portions of the work should be of service to the legal profession.

Part IV. is designed solely for lawyers, and as it contains in a convenient way the case-law touching the different sections of the Employers' Liability Act it is confidently hoped that it will be found valuable.

Part V. deals at some length with questions which it is expected will fall to be discussed in connection with that prospective legislation which cannot now be long delayed.

Mr. Spens is responsible for Parts I., II., III., and V., and Mr. Younger for Part IV.

The authors desire to be considered as wholly independent of each other, while it is believed that the different parts will be found useful as explanatory of and supplementary to each other.

## INTRODUCTION.

THIS book is divided into five parts, viz.:—

I. The liability of employers to the public for injury to person or property through the negligence or other fault of the servant or servants of the former.

II. The liability at common law of employers to those employed by them for injury occasioned through the employer's personal fault, or through the fault of a servant or servants.

III. The liability of employers to their workmen under statute—that is, by Acts of Parliament such as the Employers' Liability Act of 1880, and the Factory and Workshop Act.

IV. The Employers' Liability Act (1880) annotated with special reference to the case-law of England and Scotland; and

V. Suggestions as to what alterations should be made on the present law in the light of the experience afforded by the working of the Employers' Liability Act.

These will be taken up in the order given above.



## ADDENDA ET ERRATA.

P. 21, sixth line from top, between words "indeed" and "apart," *insert* with one exception noted *infra*.

P. 25, seventh line from top ("") omitted.

Pp. 26-28. Since the pages referred to were printed off, the doctrine laid down in *Thorogood v. Bryan* (18 L.J. 336) has been repudiated by the English Court of Appeal, consisting of Lord Esher, M.R., and Lindley and Lopes, L.J.J. See case of the *Bernina* (*Armstrong & ors. v. Mills*, January 24, 1887, 3 Times Law Reports 310).

P. 57, fourth line from foot, *delete* "last paper," and *insert* "this part."

P. 80, *Rourke v. White Moss Colliery Co.* For "1 C.P.D. 536" read "2 C.P.D. 205."

Pp. 128, 181 *et seq.* Just as the index of matter is being printed off, the authority of the case of *Weblin v. Ballard* has been seriously affected by the decision in the Court of Appeal of *Thomas v. Quartermaine*. In the Divisional Court Wills and Grantham, J.J., decided the latter case on grounds which they stated did not conflict with *Weblin v. Ballard*, but the following rubric (3 Times Law Reports, 495) correctly sets forth the effect of the decision in the Court of Appeal. "A workman suing under Sec. 1 of the Employers' Liability Act, 1880, for damages for personal injury, is (with certain express exceptions) in the same position as—but no better than—a member of the public using the master's premises on business. Therefore, in an action by a workman to recover damages for injuries sustained by reason of a defect in the ways, or plant, where such defect was not contrary to any statute or law, the employer can avail himself of the defence that the workman had full knowledge of the defect and of the consequent danger, and voluntarily incurred the risk by continuing to work near it. So held by Bowen and Fry, L.J.J., Lord Esher, M.R., dissenting." It is thought, however, by the writer that the views of Lord Esher and of A. L. Smith and Matthew, J.J., in *Weblin v. Ballard*, would receive effect in Scotland.

P. 229 *et seq.* *Sweeney v. M'Gilvray*, 24 S.L.R. 91, now also reported 14 R. 105.

P. 244, seventh line from top, for p. 248 read 247.

P. 253, thirteenth line from top, *omit* sentence beginning "More" and ending "IV."

P. 258, sixth line from foot, for "120" read "320."

P. 262. *Jack v. N.B.R. Co.*, now reported 24 S.L.R. 211 and 14 R. 263.

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# EMPLOYERS AND EMPLOYED.

## PART I.

I. *The liability of employers to the public for injury to person or property through the negligence or other fault of the servant or servants of the former.*—Previous to the passing of the recent Employers' Liability Act, a Select Committee was, on 22nd June, 1876, appointed to inquire "whether it may be expedient to render masters liable for injuries occasioned to their servants by the negligent acts of certificated managers of collieries, managers, foremen, and others to whom the general control and superintendence of workshops and works is committed, and whether the words 'common employment' could be defined by legislative enactment more clearly than it is by the law as it at present stands." That Committee was moved for by Mr. Macdonald, M.P. for Stafford, admittedly representing the coal and iron miners of Great Britain, but of course the Committee was appointed with a field of inquiry embracing the whole industries of the country.

With the results of that Committee's labours I will have later on to deal in discussing the effect of the provisions of the Employers' Liability Act of 1880 ;

but in the meantime the terms of the appointment are quoted to show that there was no intention when the Committee was appointed to challenge the existing law as to the liability of employers for their servants to the outside public for default resulting in injury.

In the course of the inquiry the theory upon which this established law rested necessarily fell to be examined, and in the report which was issued by the Committee the following passage occurs:—"That a man should be liable for injury occasioned by his own act, neglect, or permission is obviously just. That a man should be liable for injury occasioned by acts which he has neither done or permitted, which have resulted from no neglect of his, or in disobedience to his order, or which he may have forbidden, is a result the justice of which it is not easy at once to recognize, and one which some eminent lawyers do not hesitate to describe as essentially unjust. Such, however, is, and since the reign of Charles II. appears to have been, the law of this country as to injuries occasioned by servants in the course of their employment to persons not in the same employment. For such injuries the master employing the servant is liable, notwithstanding that the acts which occasioned them may not have been ordered or authorized, or may even have been forbidden. There is a strong concurrence of authority against the justice of this law, though there seems to be some difference of opinion as to its origin and historical development."

This passage, probably correctly enough, sums up the evidence led before the Committee on the point so far as English law is concerned. The case referred to is the case of *Michael v. Allestree*, reported in the second volume of *Levinz's Reports*. Lord Esher, now Master of



the Rolls, when examined before the Committee stated the facts of that case thus—"It was a case in which the defendant and his servant had an action brought against them both for an injury that happened to a person in Lincoln's Inn Fields where horses were being trained or exercised in a break; and according to the report the master was absent, and yet the action was brought against him as well as his servant, and the jury found against them both, and the judgment was upheld. Obviously, therefore, that judgment could not have been upheld against the master except upon the theory and decision that the master was liable for the negligence of his servant." That decision has never been impugned by any subsequent English decision. No doubt in the great case of *Priestly v. Fowler*, to which subsequent reference will have to be made, as well as in other cases, its soundness would be attacked at the bar; but it remains the law of England on this particular point, and has been the authority on the subject since it was so ruled in the reign of Charles II.

In Scotland it was not till a later date that a master was held liable for his servant's wrong-doing. The case of *Dalrymple v. M'Gill* in the year 1804 (Hume, 292) seems rather an authority to a contrary effect; but in that case it is to be noted that the injury complained of could be argued to have resulted from malicious conduct on the part of the servant for whose act the master was sought to be made liable, and in that case the master was not held liable. The case, however, of *Hill v. Merrick and Hay* (Hume, 299) practically ruled the law to the same effect, if indeed it did not go farther in the direction of liability on the part of the master than the English law.

The general rule of law, then, is that a master is responsible to the outside public for injuries received through the fault of the servant in the course of his employment and acting within the scope of his authority.

As pointed out by Lord Bramwell, in a remarkable letter which he addressed to Sir Henry Jackson, Q.C., M.P., one of the leading members of the Committee before referred to, four things are necessary to constitute liability of an employer for injuries inflicted on members of the outside public through the negligence of those employed. These concurrences are so well put, and the illustrations are so apt and forcible, that I take the liberty of quoting the following passage:—"First, the actual doer of the mischief must be a servant of the person sought to be made liable. It is not enough he is employed, if not as a servant. If I employ my servant to pull down a wall, and by his negligence he injures a passer-by, I am liable. If I employ a firm of builders to do it, I am not liable. The same thing is true if I employ a working bricklayer. I do not know that it is necessary to define or describe a servant. Shortly, the relation of master and servant exists where the master can not only order the work, but how it shall be done. When the person to do the work may do it as he pleases then such a person is not a servant. Next, the servant must be acting within the scope of his employment. If my coachman takes my carriage and horses to give his wife a ride, and is guilty of negligence causing damage, I am not liable. Next, the damage to be recoverable against the master must be the result of negligence. If caused wilfully, the master is not liable. If my coachman wilfully

drives against anyone or his carriage, I am not liable for the damage resulting. Lastly, the person injured to have any remedy must be one I have called of the outside world. The master is not liable to any one with whom he has entered into some relation, unless such liability was one of the terms of that relation. Thus, if my servant drives over a stranger, I am liable. If my friend is having a drive with me, and is injured by my servant's negligent driving, I am not liable, because it is not one of the terms of our relation. If the passenger had paid me money to carry him, I should be liable under the first head of liability, because I had contracted with him that he should be driven with care. If my servant leaves a stumbling-block in the street in the course of his work, and anybody falls over it, I am liable. If he leaves a trap-door open in my house, and my guest falls through, I am not liable."

These illustrations equally serve to demonstrate the law of Scotland. An employer is not liable for his servant's wilful criminal act. If his servant wilfully rode at a member of the public with the intention of injuring him, there is no liability on the part of the master, but if he chose to ride furiously along the roadway without any malicious intention, although against his master's orders, and thereby injured a member of the public (for which act he would be equally liable to a criminal prosecution), the master would be also liable to damages to the injured party.

What, then, is the theory upon which the liability of employers to the public for the default of the servants of the former is based? It is very difficult to arrive at a satisfactory conclusion. The ordinary

rule, of course, of civil, as of criminal, law is that a man is only liable for his own acts. As pointed out by Lord Bramwell, it is illogical to say that the theory of law is that the master is liable because he has given the wrong-doer the means of mischief, because if that were the theory of the law the master would be equally liable for the wilful and criminal acts of the servant if occurring through machinery or animals entrusted to his care as he would be if they were negligent or reckless acts.

Again, the Latin maxim of *who does it through another does it by himself* equally fails, as Lord Bramwell says, as a theory imposing legal liability, because a master cannot be said to do that thing through another which he has expressly and directly forbidden to the man who does it, and yet for such act the master may be liable. Thus, for instance, a master might instruct his servant on no account to ride his horse at a gallop. In deliberate violation of that order the servant might do this, with the result of losing control over the animal and finally injuring members of the public thereby. In such a case the master cannot truly be said to have done that act through another when it had been done in defiance of his orders. Or, again, being another illustration of Lord Bramwell's, a coachman drives without a lamp contrary to orders, and injury results to a member of the public. That is certainly not the master's act, but something which was done in defiance of his order; therefore is something which was not done for him through another, and for this the master is liable.

I agree with Lord Bramwell that the only substantial and colourable reason which there is for the law is

practically this, that the law of liability of employers for the negligent acts of servants acts as a wholesome deterrent against recklessness generally. A master under the present system of law will not retain a careless servant, and the servant, knowing this, is rendered careful. What I have just said is stated in the following way by Lord Bramwell :—"There is another reason which exists in fact—whether good or bad is another matter. A man is walking on the Queen's highway, and is run over by a servant. He may say, with some colour of fairness—'I was doing what I had a right to do. I was injured by your servant. I had no voice in the choice of him. I could only keep out of the risks of injury from him by foregoing my right to walk in the public streets. Therefore, to make you and other masters careful in the choice of servants, to whom you give the means of mischief, you and other masters must compensate for that mischief when it happens.'"

Employers, therefore, are liable to make reparation for accidents occasioned by the servant's fault, though not for wilful and malicious acts, or acts plainly done out-with the scope of the servant's authority.\*

\* The following brief enumeration of other cases in which there may be liability for servants on the part of the master may be found useful, fault on the part of the servant being not necessarily implied in all such cases. Wherever a master expressly authorizes a servant to contract, the master, of course, is liable to implement the obligations of such contract. That contract, which has been made by his authority for him, he is, of course, bound to fulfil. This is what is called in law "express mandate," and there is, of course, no difficulty with reference to this class of questions, if it be capable of proof that such instructions were given by the master. But the more difficult class of questions is that where the doctrine of implied mandate is raised. This class of cases principally turns upon an answer to the question of whether the outside public were in the circumstances entitled to believe that the servant had the master's authority to pledge his credit. The general rules of law



Before, however, passing on to deal with the defences with regard to this point are as follow :—A servant is not entitled to open an account and pledge his or her master's credit for goods where the master has been in the habit of himself dealing personally with the furnisher of the goods, or if there has been a system of ready-money payments, and if the goods so supplied have even been used in the master's family, he will not be liable if the master paid the servant cash to pay for these and the latter embezzled it. That rule was emphatically laid down by a great English judge, Lord Kenyon—"Nothing could be clearer than that where a man gives his servant money to pay for the commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again." These remarks have reference to tradesmen with whom the master has been in the habit of dealing either directly himself or on a system of ready money. If, however, there has been a system of credit, or even if there has generally been a system of ready money, but occasionally credit taken, for a more extensive system of credit dealing begun by the servant without the master's authority, the master would be liable—the theory being that if a credit system be once inaugurated, the tradesman is entitled to assume that orders for goods on credit have the master's sanction. A servant, however, is not entitled to pledge the master's credit with tradespeople with whom the master has not dealt, but if the goods have been supplied to, and consumed by, the master's family, cash not having been paid to the servant therefor, there would probably be liability therefor, unless the master could show that he was wholly unaware of the matter, and that they were not necessities. One exception may be noted to the general rule of law. Special offices have been held to warrant a mandate to contract in connection with articles or chattels supposed to fall within the special scope of the office. A coachman wearing a master's livery was in England held to have pledged his master's credit for the hire of horses; and in another English case a groom was held to have pledged his master's credit for the shoeing of the horses of the latter and veterinary medicine, although there was an agreement between master and servant that the latter should see to all that was required in these ways on account of the payment of a certain sum per annum. Of course, if any person deals with a servant on credit, having notice, or otherwise being cognizant of the fact that it is outwith the master's authority entrusted to the servant, the master will not be liable. Thus, for instance, to take the illustration given above, if after the farrier had supplied veterinary medicine and shod horses to a certain amount, he was then informed by the servant of the contract between his master and him for goods supplied subsequent thereto, the master would not be liable. I have touched very briefly on this question of pledging the master's credit, because outwith the scope of the scheme of this volume; but I may refer those interested to Lord Fraser's work on Master and Servant, 2nd edition, pp. 141-148 inclusive, in which this question is dealt with exhaustively.

which may be raised in connection with an action for damages founded on the negligence of a servant, it seems necessary to refer briefly to the question—How and to what extent is a master liable for his servant's criminal act?

Mr. Ilbert, in his examination before the Select Committee referred to, thus replies, in answer to the following question:—First, I will ask you as to what is the law of liability criminally of a master for the negligence of his servant? “The master is only liable criminally for the acts of his servant when he expressly commands or personally co-operates in them.” This may be a correct statement of English common law, but it is hardly accurate as an exposition of Scotch law.

A master, of course, is criminally liable for any crime in which he intentionally co-operates. Thus, if he orders his servant to stab a man, and the servant does it, he would be equally liable to be indicted as the servant would be for wilful murder. It is even possible to conceive a case where the master might alone be guilty of wilful murder, although the servant's was the hand by which the act of homicide was accomplished. Thus, for private ends he might lead a servant falsely to imagine that imminent and deadly danger was threatened by an unoffending man, and so induce or order the servant to kill, where, if the master's story were true, the homicide would be justifiable homicide, and not murder.

But again, while the master is not liable criminally at common law for the criminal acts of servants, there is at least one class of cases in Scotland where criminal

responsibility may arise through the act of a servant, viz., in cases of culpable homicide. In the usual case, no doubt, a master is not criminally liable for culpable homicide by his servant. Culpable homicide, however, is a crime which ranges over a considerable radius. It is sometimes a crime so closely approaching to murder that the appropriate sentence is penal servitude for life. On the other hand, it may merely mean some error of judgment or want of presence of mind on the part of one who in the circumstances professed his ability for the work entrusted to him, which may infer criminal liability, but can hardly be said to affix any stigma of moral guilt, and for which the appropriate punishment in any case should not exceed a few months' imprisonment. Now a master might in certain circumstances be held criminally responsible for deaths caused by the ignorance or rashness of a servant in whose selection for responsible work entrusted to him he had taken no care in the way of ascertaining his capabilities. Thus, for instance, being an illustration quoted by Lord Fraser, and taken from "Bell's Notes to Hume," an apothecary might be criminally liable where he employed an ignorant shopman to dispense drugs where such dispensing resulted in the death of a customer.

As regards criminal liability in connection with statutory offences, there are various penal statutes which make—and properly make—the master responsible for his servant's breach of the provisions of such statutes. It is obvious that in certain descriptions of statutory offences the offence charged could in many cases never be brought home to the master unless the presumption that the servant's act is the act of the

master falls to be explained away by the master. Familiar illustrations of such criminal presumptions are to be found in the Adulteration, the Alkali, and the Mines Regulations Acts.

Thus Mr. Ilbert says, in his evidence before the Committee referred to above in answer to the question, "No amount of mere negligence would make him (the master) criminally liable?"—"There is an apparent exception in certain cases; under certain penal statutes the master is liable for acts which he has not commanded or authorized, but these are not quite cases of criminal liability in the proper sense. I give as an instance the Revenue law. A master may be fined for a breach of the Revenue laws committed by one of his servants in the case of smuggling and so on. There are other Acts of the same kind. Under the Alkali Act, for instance, the owner of an alkali work in which an offence against the Act has been committed is deemed to have committed an offence, unless he proves that he has used due diligence to comply with the Act, and that the offence was committed by some agent, servant, or workman (to be charged by name), without the knowledge, consent, or connivance of the master."

It is trite law that no one is bound to commit a crime, and therefore the servant will not be shielded on account of his master's order to commit a crime unless it can be proved that he was in complete ignorance of the consequences of the act which he was incited or ordered to commit. The master is, of course, liable civilly (that is, to pay damages) for any criminal act of the servant committed either at his command, or which the servant had valid reasons for believing were by his master's implied orders. He is also liable

civilly at common law for his servant's negligent act whereby death or injury has resulted, although such act may have been of such a nature as to justify a criminal charge of culpable homicide, or furious driving to the injury of the lieges.

In the general case then the employer is responsible to members of the outside public for the negligence of his servant resulting in injury if the act complained of is not a wilfully criminal one, and if occurring within the scope of the servant's authority. Assuming that there has been a certain amount of negligence on the part of a person said to be the defender's servant which at all events is to some extent accountable for the accident, let us see what defences are stateable to an action for damages founded upon the averment of fault on the part of such person. I am assuming that it is impossible to deny fault on the part of some person said to be the defender's servant. Very often, indeed almost invariably, fault is denied in such actions. That is a matter of proof, but the fault may be one either of omission or commission.

On the footing, however, that such question of fact is determined against the defender—there may be a defence—(1) that the person through whose fault the accident happened is a fellow-servant; (2) that the person by whose default the accident is said to have been caused is not a servant of the defender's; (3) that although the person in fault is a servant of the defender, the contract of employment in connection with which the pursuer met with the accident complained of was one where he must be held to have undertaken all risks incident to such employment without claim for reparation except against those per-



sonally in fault; (4) that there was such contributory carelessness on the part of the person injured, or the party killed (if his representatives are suing for damages) as to bar any claim of damage; (5) that the person hurt was a trespasser or wrong-doer; (6) that the injury which has been occasioned was not within the ordinary or probable consequences of the act or default complained of. These defences I will take up in the above order.

(1.) *That the person through whose fault the accident happened is a fellow-servant.*

I am dealing at present with the liability of the employer to the outside public; but questions sometimes can be and have been raised as to whether in point of fact an injured person is or is not a fellow-servant of the person through whose fault the injury has happened. "A servant," Lord Fraser says, "is a person who ultroneously agrees to give his services to another for a determinate time and an ascertained hire, and who may get rid of the contract by paying damages." To what extent under statute law an employer is liable for the faults of servants to their fellow-servants will be dealt with later on, but at common law A cannot recover damages because injured by B, who, along with himself, are both servants of C. Thus, if a Glasgow baker have two vans driven by drivers in his employment, and they come into collision, although there might be a claim at the instance of the one man as against the other, there would be none against the employer. It may also here be noted that those who are volunteers must be held as servants—*e.g.*, if a servant of the employer asked a man on the street to do something

which the man agreed to do without any contract with the employer, he could not be held to be in a better position, if, indeed, as good, if injury resulted through the work which he volunteered to do, and he made a claim of damage in connection therewith—(*Potter v. Faulkener*, 27th November, 1861, 5 L.T., 455).

(2.) *That the person by whose default the accident is said to have been caused is not a servant of the defender's.*

It is a good defence to an action for damages brought by a person injured, or by the representatives of a person killed by an injury, if it be proved that the person through whose fault the injury occurred, though in no sense the fellow-servant of the injured party, was the servant of some person who had made an independent contract with the defender. Thus, for instance, if the Corporation of Glasgow were building some public edifice, and made a contract with a joiner for the whole joiner-work required in connection therewith, and if by the fault of one of the joiners's men a member of the public were killed or injured, no action would lie against the Corporation of Glasgow. The action would be against the master joiner.

A very fair test of who is the employer is to be found in an answer to the inquiries, Who pays? and who has the power of dismissal? If in such a case as that referred to the Corporation of Glasgow in their bargain with their joiner placed some person in the building who had a power of dismissing any of the joiner's men as he thought fit, then the contract with the joiner it might be argued was not an independent contract. In the ordinary case, however, if a man (not a servant) has been injured through the fault of

a servant who has been acting within the scope of his authority, the person who pays the latter his wages is responsible for such fault as well as the defaulter himself.

(3.) *That although the person in fault is a servant of the defender, the contract of employment in connection with which the pursuer met with the accident complained of was one where he must have been held to have undertaken all risks incident to such employment without claim for reparation except against those personally in fault.*

Two recent cases in the Court of Session may be held to establish that Scotch law is to the effect stated. These cases are *Woodhead v. Gartness Mineral Company*, 10th February, 1877 (4 R., 469), and *Wingate v. the Monkland Iron Company*, November 8, 1884 (12 R., 91). The first of these cases was brought before seven judges. It was an action raised by the representatives of a miner in the employment of contractors for driving a level in a mine belonging to the company. The contractors were not in a position very much better than that of the ordinary miners. The manager and underground manager were in charge of the pit, and had a power of dismissal with regard to every person employed in it, including the men employed by the contractors. The miner whose death formed the subject of inquiry was killed through the negligence of the underground manager.

The Lord Justice-Clerk (Moncreiff) held that the company were responsible for the proper execution of their portion of the work by their servants to the contractor and his servants. Lord Deas held that the

deceased miner was the fellow-servant of the underground manager (this case, it may be observed, was prior to the passing of the Employers' Liability Act, and was therefore necessarily laid at common law), but the opinion of Lord-President Inglis was concurred in by Lords Ormidale, Mure, Gifford, and Shand, and the result of that opinion may be summarized in the Lord-President's own words :—" As the result of the whole authorities, it appears to me that one of the conditions subject to which every man must become a member of one of those great organizations of labour is that he shall take on himself all the perils naturally incident to the work he undertakes. . . . The whole persons engaged in a mine form one organization of labour for one common end, however different their functions may be, and are all subject to one general control exercised by the mineowner or those to whom his authority is delegated. This community of labour and of subjection to control arises from the very nature of the work, and from the necessity of providing against danger and insuring for that purpose the maintenance of discipline. . . . To hold that a master's obligations and liabilities to the individual workmen depend on whether they are technically his servants or employed by a contractor for piecework in some limited portion of the mine, while it would be inconsistent with the legal principle, would also, I think, introduce great confusion."

The later action referred to, of Wingate against the Monkland Iron Company, put the theory of law given effect to in Woodhead's case upon a perhaps even broader basis. In this case the action was brought by an apprentice to a firm of mining engineers against

the lessees of a certain pit. Under the provisions of the lease between the defenders and the owners of the pit it was stipulated for certain purposes that surveys of the workings should be made from time to time by persons of skill to be named by the lessors and approved by the lessees. Messrs. M'Creath & Stevenson were the mining engineers selected. They sent the pursuer, along with another apprentice, in April, 1883, to make a survey of a part of one of the mines. These apprentices were accompanied by the oversman and fireman, and all four carried naked lights. They went to a part of the mine where it was admitted there was a risk of gas, and the fireman with his naked light went in front to show the pursuer the bearing of the road, and an explosion took place in consequence of the naked light in the fireman's hand, and all four were more or less hurt. On the proof, the fireman admitted he was to blame in not taking a safety lamp.

The action was originally raised in the Sheriff Court. The Sheriff-Substitute (Birnie), to whose exposition of the law and explanation of authorities Lord Young, in giving the leading opinion, paid a well-deserved compliment, held, on the authority of the case of Woodhead, that the risk was one incident to the employment, and that no claim of damages lay against the Monkland Iron Company. The Sheriff reversed, but the whole Judges of the Second Division concurred in holding there was no liability. The Lord Justice-Clerk said, referring to the case of Woodhead, "To that judgment I was opposed, but it received very full consideration, and we must apply its rule in the present instance." As, however, the general question is one of importance, perhaps it may not be uninterest-



ing or out of place here to quote the following clear passage in Lord Young's opinion, which, as I have already noted, was the leading one:—"I do not, of course, doubt for a moment that the defenders are responsible to the pursuer, and, indeed, all others, for the consequences of any fault or failure of duty on their own part. . . . Assuming, as I do, that the fireman who carried that one of the four naked lamps which, in fact, caused the explosion was to blame, I doubt whether in the circumstances the others who were engaged in the same work, and were also carrying naked lamps, could have recovered from him. But assuming that they could, I am of opinion that the defenders, as his employers, are not responsible to them, or any of them, for his conduct in this matter. They were all four engaged in contract work connected with the business of the pit, and I think it was no part or term of the contract of any of them that the safety of each should be guaranteed by the defenders against the carelessness or rashness of the others."

The principle of these decisions was followed in the later case of *Maguire v. Russell* (June 10th, 1885, 12 R., 1073). I will have occasion later on\* again to refer to this subject in connection with the defence of collaborateur, where it will be pointed out that English authority is against the principle referred to.

(4.) *That there was such contributory carelessness on the part of the person injured or the party killed (if his representatives are suing for damages) as to bar any claim for reparation.*

This defence to an action for damages by a person

\* Page 80 *et seq.*



who has been injured is one which is equally applicable to the case where a member of the outside public has been injured, or where it is a servant who has been injured in the employment of his master. I need hardly also say that it is equally a defence whether the action is brought by a person who has been injured or by the representatives of a person who has been killed through the fault of an employer, or by some person for whom such employer is responsible. It is also an equally good defence whether the action is based on the rules of common law, or is founded upon the provisions of the Employers' Liability Act. Therefore all that I have to say here on the legal effect of contributory carelessness, and what constitutes contributory carelessness, is also to be taken in connection with the question of the liability of employers to those employed, generally speaking, although there are certain distinctions, *e.g.*, under the Factory Act, where, rightly or wrongly, the neglect of statutory provisions has been held to create liability, in spite of such contributory carelessness as might otherwise have been held to be a valid defence. Later on these distinctions will be pointed out.

In the meantime, however, and dealing with the question from the point of view of common law, I propose to discuss under this head (*a*) what amount of contributory carelessness will bar a claim of damage at the instance of a party injured or at the instance of the representatives of a person who has been killed; and (*b*) what, if any, distinction obtains in connection with such claim with regard to the contributory carelessness of adults and children respectively.

(a) *What amount of contributory carelessness will bar a claim of damages at the instance of a party injured or at the instance of the representatives of the person who has been killed?*

Lord Fraser thus states the doctrine of contributory carelessness:—"The master is not necessarily responsible though the injury does result from the negligence of the servant, provided the party injured might have avoided the consequences by taking reasonable—that is, ordinary care." "It has been questioned," says Mr. Campbell (p. 180, *Campbell on the Law of Negligence*) "whether this doctrine of contributory negligence is based on the reason that a person so guilty ought to be personally barred from suing, or whether it is merely a corollary to the proposition that the plaintiff must prove damage resulting from the breach of duty on the part of the defendant as its proximate cause." The latter part of this sentence refers to the doctrine with which, after the subjects of trespass and contributory carelessness, I propose to deal—namely, the doctrine of proximate and remote cause, which, generally speaking, is to the effect that damages cannot be claimed unless the injury forming the subject of claim is within the ordinary or probable consequences of the act or default complained of.

It is not to be disguised that the decisions in the Court of Session as to what acts or omissions constitute such contributory negligence as to bar a claim for damage cannot in all cases logically be reconciled. Addison on the Law of Torts, 4th edition, p. 400, says:—"A plaintiff cannot recover damages in a Court of common law if but for his own negligence or

that of the person who represents him the accident would not have happened, though there was negligence on the part of the defendant, for the plaintiff cannot complain of an injury which his own negligence and want of care have contributed to bring upon him." It is, indeed, apart from the question of contributory negligence of children, impossible to say that there is any distinction between the laws of England and Scotland as to the plea of contributory negligence. There can, I take it, be no doubt that the principle of law which was given effect to in the case of *Radley v. London and North-Western Railway Company*, November 21 and December 1, 1876 (L.R. App. Cases, vol. i., 759), is a binding authority upon the whole inferior Courts of the kingdom, because it was an appeal from the Exchequer Chamber to the House of Lords upon a question as to which there can be no conflict between the laws of the two kingdoms on the ground that these are based upon different derivations.

Indeed, the effect of the decision in the great case to which reference will be made later on (*Reid v. Bartonshill Coal Company*) seems to show that the House of Lords will not regard a question of master and servant or employer and employed as ruled by a series of Scotch decisions, but will deal with it on principle. If this be the conclusion arrived at, then the House of Lords would hold themselves bound by the principle in *Radley's* case, although it were open to argument that a series of decisions in the Scotch Courts had been very much to the effect that the view of Lord Justice Brett (now Master of the Rolls) in the case under appeal was sound.

Nor am I prepared to say that even since the date of Radley's case has the rule of law there enunciated been uniformly observed by the Scotch judges. It does not, indeed, admit of dispute that certain acts, or a certain act which a plaintiff may have committed, so contributed to the accident that without such acts or act there would have been no accident, and yet there may be a claim for damage. Thus, for instance, if an accident to machinery happened, in consequence of which, in the confusion of the moment, a plaintiff ran to one side, whereas if he had reasoned the matter out he would have run to the other, no Court would ever have held such an error of judgment, caused naturally by the confusion incident to the accident, would bar a claim of damage, if there was plainly fault on the part of the defenders primarily with reference to the machinery accident.

But where there is some act of omission or commission which a reasonable man might with ordinary care have avoided, then only is the question one as to which controversy can arise. It is with reference to one phase of this not uncommon class of cases that Radley's case is of importance. The members of the House of Lords who sat in the appeal case referred to were Lord Chancellor Cairns and Lords Blackburn, Gordon, and Penzance. It is hardly necessary to say that the authority of no Lord Chancellor, in at least the present generation, ranks higher than that of Lord Cairns. Lord Penzance gave the leading judgment in the case, but it was concurred in expressly and without reservation by the Lord Chancellor and the other noble and learned Lords present. The rubric bears:—"Though a plaintiff may have been guilty of

negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him, *i.e.*, the defendant." The point is one of so much importance that I think it desirable to give here the following somewhat lengthy quotation from the leading judgment given by Lord Penzance :—" The first proposition is a general one to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that although the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann* (10 M. and W., 546), supported in that of *Tuff v. Warman* (5 Q.B.N.S., 573), and other cases, and has been universally applied in cases of this character without question. The only point for consideration, therefore, is whether the learned Judge properly presented it to the mind of the jury. It seems impossible to say that he did. At the beginning of his summing up he laid down the following as the propositions of law which governed the case :—" It is for the plaintiff to satisfy you that



this accident happened through the negligence of the defendants' servants, and as between them and the defendants that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident, so that if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover." The language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned Judge, have found in the plaintiffs' favour, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all. The learned Judge then went on to describe to the jury what it was that might properly be considered to constitute negligence—first, in the conduct of the defendants, and then in the conduct of the plaintiffs; and having done this, he again reverted to the governing propositions of law as follows:—"There seem to be two views; it is for you to say entirely as to both points; but the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants"! This again is entirely without



qualification, and the undoubted meaning of it is that if there was any contributory negligence on the part of the plaintiffs they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies v. Mann* and the other cases above alluded to, and in no part of the summing up is that doctrine anywhere to be found.

The result of this important case I take to be that where there has been primary fault on the part of an employer, or those for whom he is responsible, there will be liability therefor to the injured party, although the latter has been guilty of contributory carelessness, if notwithstanding such contributory carelessness the master or those legally responsible for him could still by the exercise of reasonable care have avoided the accident. I am not prepared to say that Scotch decisions can be said to be wholly in accordance with the doctrine thus enunciated. There has, I think, been a tendency to hold actions as barred by contributory carelessness which, nevertheless, under the ruling in *Radley's* case would not have been excluded. But I submit that the authoritative rule of law is that which is embodied in the judgment of Lord Penzance, and I have no doubt whatever that it would be applied in any Scotch case appealed to the House of Lords; that is to say, if the point were to come up as one of law before that august tribunal, but as lawyers know, the finality of the Court of Session in certain cases as to matters of fact has a tendency occasionally to obscure the real point which ought to come up for decision.

In connection, however, with the question of contributory carelessness a distinction may be noted

between English and Scotch law. As I have previously stated, there is no logical basis for any distinction between English and Scotch law as to the liability of employers; and as the English and Scotch cases which conflict were none of them appealed to the House of Lords the point still remains open for a ruling decision by the supreme tribunal.

It was held in the case of *Thorogood v. Bryan* (18 L.J., 336) that a passenger in one omnibus could not recover damages from the owners of another omnibus the driver of which had admittedly been in fault in connection with a collision which took place, on the ground that, being a passenger, he was identified with the driver of his omnibus, who was held to be guilty of contributory carelessness. In the later case also of *Armstrong v. Lancashire and Yorkshire Railway Company* (L.R. 10 Ex., 47), it was held that the inspector of a railway company travelling in one of their trains on the line of another company over which the first company had running powers, and who met with damage, caused partly by the negligence of the second company causing an obstruction, and partly by the reckless driving of the engine-driver of the first company, was unable to recover in an action against the second company.

The principle upon which these decisions is based has been criticised adversely by Dr. Lushington and by Messrs. Smith and Campbell, writers on the subject of negligence. So far, however, as Scotch law is concerned the doctrine of identification referred to has been expressly repudiated by an unanimous judgment of the Second Division of the Court of Session—*Adams v. Glasgow and South-Western Railway Company* (December 7, 1875, 3 R., 215).

The Lord Justice-Clerk (Moncreiff) in that case said —“But before we can be expected to follow the opinions of English judges, entitled and certain to receive at our hands deserved respect, we must have something more than mere judicial asseveration for our guidance, some intelligible principle, some foundation in law and reason, in support of the rule. After carefully examining this case of Thorogood, I entirely sympathize with the surprise expressed by Dr. Lushington at the judgment itself, and the inability which that great lawyer felt to comprehend the grounds on which it proceeded. It has not been received with favour by the profession in England, as the significant passage in ‘Smith’s Leading Cases’ (6th ed. 1, p. 266) sufficiently shows; but as the judges in the recent case of Armstrong certainly expressed approval of it (although their remarks were *obiter*), and the scope of the principle or rule is very wide, it may be right to examine the matter closely, and to ascertain to what amount of authority the decision is entitled.” The learned judge then went on to point out that the decision in Thorogood’s case was based upon “the supposed identity in law between the carrier and the passenger”; and proceeded:—“If it be true that the wrongful act of the carrier is constructively and by imputation the wrongful act of the passenger, it necessarily follows that whenever a third party is injured in the course of the execution of the carrier’s contract by rail every passenger in the train is liable to make reparation to the person so injured, because being identical with the carrier, and responsible for his wrongful acts, they did or contributed to the injury.” Lord Moncreiff admits that, while this is the logical conclusion of the doctrine of identification, it

could not be contemplated to such an extent or effect. "I can only infer that the identity spoken of is not to be understood of a complete legal identity, but that the term is used in a popular sense sufficient to exclude the action, but not capable of being, nor intended to be, carried out to all its other legitimate and logical results. The question whether the passenger contributed to the injury is a matter of fact which cannot be partially true and partially false. But is there any ground for holding it to be true in any sense? It seems clear to me that the element which is essential to the application of the maxim *Qui facit per alium facit per se* (who does a thing by another does it by himself) is entirely absent in the relation of carrier and passenger—viz., the element of authority and control. No man can be responsible for the acts of another who has no authority over him."

In this judgment Lords Ormidale and Gifford concurred, Lord Neaves being absent. I have thought it right to give at some length the above extracts from Lord Moncreiff's judgment as marking, as case law at present stands, an important distinction between English and Scotch law. The result of the case of Adams referred to I take to be that if a passenger in a hired conveyance is injured through the double fault of his own driver and of the driver of another conveyance there is joint and several liability on the part of the owners of both. Both owners probably should be called to the action; but so far as the injured party is concerned he is entitled to what is called in legal phrase a joint and several decree—that is to say, a judgment which can be enforced to its full extent against either.

I now come to the second point under the defence of contributory carelessness, viz. :—

(b) *What, if any, distinction obtains in connection with claims for personal injury with regard to the contributory carelessness of adults and children respectively?*

As to this point, there may perhaps be some difference in the case law of England and Scotland. In the case of *Mangan v. Atterton* (L.R. 1 Ex., 239), it was held by the English Exchequer Court that a child was barred from redress when the immediate cause of the accident was its own meddling with an oil-crushing machine, which had been left unguarded in a market place; but in the case of *Campbell v. Ord & Madison* in the Court of Session (November 5, 1873, 1 R., 149), which practically presented precisely the same question, the Court held there was liability.

Mr. Campbell, commenting upon these and other decisions dealing with the same class of questions, says :—" I think the true principle is that where the damage results immediately from a trespass, whether of child or man, the question is whether the defendant is chargeable with such heedlessness or rashness as in its probable and natural results is equivalent to the setting without notice of a dangerous trap or spring-gun " (*Campbell on Negligence*, 2nd ed., p. 187.)

In the subsequent case of *Clark v. Chambers* (L.R. 3 Q.B., 327), doubts were thrown out as to the soundness of the decision in the case of *Mangan v. Atterton*. The case of *Campbell v. Ord & Madison* is of importance with reference to the question under discussion as



containing an exposition of the law on this very point by Lord Moncreiff. It was held in that case that the question whether a child had sufficient capacity to be guilty of contributory negligence was a question not of law, but of fact, which had been properly left to the jury. The case, as indicated above, went to a jury. The boy injured was three years and eleven months old, and he got the injury for which damages were claimed by putting his fingers between the cogwheels of an oil-cake crusher left in a public street of Hawick unguarded, and which was put in motion by the injured boy's brother, a child of seven.

The defender's counsel required the Lord Justice-Clerk (Moncreiff) to direct the jury as follows:—That the child, Robert Campbell, was to be held in law as capable of contributing to the accident which resulted in the damage libelled. The Lord Justice-Clerk refused so to direct the jury, and on the case coming before the Second Division on a bill of exceptions he expressed himself in the following way:—“On the bill of exceptions, I am of opinion that neither of the propositions I was asked to lay down is sound in law. The first is a proposition not of law, but of fact. It would be as unsound to say as a proposition in law that this child was not capable of negligence as to say that he was. Negligence implies a capacity to apprehend intelligently the duty, obligation, or precaution neglected, and that depends to a large degree on the nature of that which is neglected, as well as on the intelligence and maturity of the person said to have neglected it. The capacity to neglect is a question of fact in the individual case as much so as negligence itself, which is always a question of fact. I told the



jury that this was a matter for themselves to decide—that a child of four years old might be guilty of negligence—and that it was for them to say whether such was the case here. The question whether the evidence ought to have led to a different conclusion arises on the motion for a new trial.”

Later on he discusses the question—“Did the boy contribute?” “It is contended on the one side that a child of this age could not be guilty of contributory negligence, on the other that his acts must be judged of without regard to his tender years. I do not agree with either proposition. This is a question of fact to be decided on the evidence. There is no doubt that if the child had been a man the act would have amounted to contributory negligence. But he was not a man. It is said he must be dealt with as if he had been a man. He must, in my opinion, be held to be nothing but what he was. There is no need or room for legal fictions or classifications to exclude the fact in such a case. He is no more to be held to have capacity which he had not than to have inches or strength which he had not. If the child was, in point of fact, unable, from his tender years, to appreciate the danger, to find the reverse would be contrary to the fact. If indeed I could have accepted the unreserved expressions reported in the recent cases decided in England as laying down a general rule—a formula to exclude the actual fact—and had felt bound by them, I should so have directed the jury, and told them that a verdict for the pursuer could not stand. But I should have thought such a course entirely inadmissible. . . . In the present case, I cannot say that the jury came to an unreasonable conclusion when they held on the

evidence that this little fellow did not and could not know that there was danger in what he did. If they were right in that he was not guilty of negligence, and their verdict was right."

Intimately mixed up with the question of contributory carelessness of children is that of the contributory negligence of parents or guardians in connection with accidents to children.

Let us suppose a case where there is unquestionably fault on the part of a defender, but there is also undoubted contributory carelessness on the part of a parent. The question arises, is there identification with the child and parent so as to bar a claim of damage. This question falls, and properly falls, to be answered in the affirmative, subject, however, to the rule laid down in *Radley's case*. It would be wholly against public policy to permit parents to expose their children to danger with the object or possibility of reaping pecuniary gain to their children or themselves. This rule of law was practically recognized in *Campbell v. Ord & Madison*, one of the questions left to the jury being whether there was contributory negligence on the part of the parent.

That question was decided in the negative by the jury, and with reference to this point on the motion for a new trial Lord Moncreiff said, "As regards the alleged negligence of the father, the jury have found that he was not negligent. The place where the children were was a common playground. They had always gone there. The father knew of no danger, and I cannot disturb the verdict on that point."

In the later case of *Greer v. Stirlingshire Road Trustees* (9 R. 1069), the rule of law referred to is

expressly recognized, and in the still later case of *M'Gregor v. Ross & Marshall* (2nd March, 1883, 10 *Rettie*, 725), it is also recognized. Lord Young makes the following statement in the case last referred to:—"There can be no contributory negligence of a child of four years. In such a case the contributory negligence can only be on the part of the parent in allowing the child to go into danger. That is not the case here." This absolute dictum, it is to be observed, is inconsistent with Lord Moncreiff's view in *Campbell v. Ord*, who left it to the jury as a matter of fact to determine whether a child four years old was or was not guilty of contributory negligence; but apart from this, the case referred to recognizes the identification of parent and child in a claim of damage for personal injuries sustained by the latter with regard to this plea of contributory negligence.\*

There is one other point to which I may allude before closing the subject of contributory carelessness. It has been held in different American cases that where the extent of the damage has been aggravated by the fault of the person injured, that only such damage is recoverable as is applicable to the injury without such aggravation. I do not think that any reported Scotch case deals with this point; but the American law on this subject has been expressly dissented from in the English Courts. In the case of *Greenland v. Chaplin* (5 *Exch.*, 243), Chief Baron Pollock said:—"I entirely concur with the rest of the Court that a person who is guilty of negligence and thereby produces injury to another has no right to say part of that mischief would not have arisen if you yourself had

\* See also *Waite v. N.E.R. Co.* (26 *L.J.Q.B.*, 417).

not been guilty of some negligence." The point referred to was raised in the recent case of *Goodwin v. Walkinshaw Oil Co.*, which came before me, and went on to the Second Division of the Court of Session, but I do not think it was argued in the higher Court (not reported in *Rettie*, *Scot. Law Rev.*, vol. i., 320).

(5.) *That the person hurt was a trespasser or wrongdoer.*

Lord Fraser endorses the following distinct statement by Lord Bramwell as to this point in the case of *Degg v. Midland Railway Company* (21st February, 1857, 26 L.J. Ex., 171), as equally a correct exposition of Scotch as well as of English law :—" We desire not to be understood as laying down any general proposition that a wrongdoer can never maintain an action. But it is obvious to a truism to say that a wrongdoer cannot, any more than one who is not a wrongdoer, maintain an action unless he has a right to complain of the act causing the injury. If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing it, drives carelessly and injures that person, the servant may be liable, but why should the master ? The law, for reasons of supposed convenience more than on principle, makes a master liable in certain cases for the acts of his servant. The public interest may require this for the public benefit, but why should a wrongdoer have the power to create such a responsibility and such a duty ? No reason can be assigned. Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury—as a blow. Others are so only from their probable consequences. There is no such thing as

absolute and intrinsic negligence ; it is always relative to some circumstance of time, place, or person. . . . . Now, for a wilful act intrinsically wrong by a servant the master is not liable. By parity of reason he ought not to be so where the act is not wrong in itself, but only so for reasons personal to the servant and his wilful disregard of them. The master's liability ought to be limited to that which he can anticipate and guard against. However this may be, it seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty ; and as a direction by a master to drive furiously, or in the way called *carelessly*, in his own park, would not be wrong in the master, it cannot be made so by a trespasser getting there and being hurt, so that *quoad* the master it is *damnum absque injuria* (loss without wrong), and if not a wrong in the master when expressly ordered, it cannot be so if done by the servant against his orders."

In the later case of *Fraser v. R. Younger & Sons* (13th June, 1867, 5 Macp., 864) Lord-President Inglis, dealing practically with the same question, said : —“ On the one hand, the pursuer contended that she had shown that the fault which led to her daughter's death was attributable entirely to the fault of the defenders or their servants, that the mash-house was the place where persons came to purchase draff, and that the mash-house was dangerous because of the shaft being unfenced. On the other hand, the defenders contended as matter of fact that the mash-house was not the proper place for such persons to come ; that they were not allowed to come into the mash-house ; and that the deceased was well aware of this rule, and



came there notwithstanding. Now, what is the direction given by the judge in these circumstances? He tells them, under that head of his charge excepted to under the second exception, 'that if they were satisfied on the evidence that Ann Fraser ought not to have been in the mash-house of the defenders on the occasion in question, that defenders were entitled to a verdict.' The chief objection to this direction—and that a very serious one—is that it is equivocal and ambiguous, and therefore calculated to mislead the jury, or, what is worse, calculated to lead different jurymen in different directions according to the meaning they might attach to the words. 'Ought not to have been in the mash-house' implies the existence of fault somewhere, but that might be either entirely in the deceased herself, or it might be entirely in the defenders' workmen, or partly on the one side and partly on the other. Now, according to what may be the state of the fact on the evidence, a different result will follow. If it was entirely the fault of the deceased herself the defenders are entitled to a verdict. If entirely the fault of the defenders or their servants the pursuer will be entitled to a verdict. If partly the fault of both the legal result is that defenders are still entitled to a verdict."

No doubt the answer of Lord Kinloch, the presiding judge at the jury trial, to the adverse criticism of his charge (which criticism was, it may be remarked, concurred in by Lords Curriebill, Deas, and Ardmillan) would have been that the words *ought not* must be held to imply a failure of duty on the part of Ann Fraser alone, and this seems the grammatical, and, indeed, the popular, meaning of the words italicized.



The only point of importance to the subject under discussion is the recognition of the general doctrine of law that trespassers cannot recover damages for injury even when there is fault on the part of employers or their servants.

In connection with trespass, however, it is settled in England (and there is no reason to doubt that the law of Scotland is the same) that a trespasser will not be barred from recovering damage for personal injury if there has been anything equivalent to a trap laid which the law, as Mr. Campbell says, "equates to intentional mischief." I may quote the following short passage from his work on the law of negligence:—"Therefore negligence of this kind may well be equated to intention. The principle is similar to that in which it is held even before the Acts prohibiting spring guns, etc., that trespass is no answer to the serious injury caused by these instruments, placed by the owner in his premises without notice. (*Bird v. Holbrook*, 4 Bing., 624). . . . I think the true principle is that where the damage results immediately from a trespass, whether of child or man, the question is whether the defender is chargeable with such heedlessness or rashness as in its probable results is equivalent to the setting without notice of a dangerous trap or a spring gun." With reference to this question of trespass, in connection with personal injury to the trespasser, reference may be made to the recent Scotch cases of *Galloway v. King*, 11th June, 1872 (10 Macp., 780), and the case of *Greer v. Stirlingshire Road Trustees*, referred to above, also to the English case of *Walker and others v. the Midland Railway Company* (House of Lords), unfortunately not reported in

the official reports, but to be found in the *Times Law Reports*, vol. ii., 450.

(6.) *That the injury which has been occasioned was not within the ordinary or probable consequences of the act or default complained of.*

"It has been questioned," says Mr. Campbell, "whether this doctrine of contributory negligence is based on the reason that a person so guilty ought to be personally barred from suing, or whether it is merely a corollary to the proposition that the plaintiff must prove damage resulting from the breach of duty on the part of the defendant as its proximate cause."

The theory of English law is that a person is not to be held liable in damages for an act or fault which causes damage, unless such damage is within the ordinary or probable consequences of the act or default. The varying circumstances of each case have to be considered in determining the question of whether the fault complained of was the proximate cause of the accident, so as to be cognizable by a Court of law.

It seems difficult to reconcile the decisions on this question in the English Courts. Illustrations both of where the accident was held proximately due to the fault complained of, and where it was held too remote to be cognizable, are given in Mr. Campbell's work ("The Law of Negligence," pp. 169-179 inclusive).

As illustrative of the very narrow distinctions on which this class of questions turns in England reference may be made to two cases, in one of which it was held that defendants were liable, and in the other that there was no liability. It was held by Justice Den-

man in the case of *Harris v. Mobbs* (June 18, 1878 (C.P. Div.), 39 L. T., 164), that there was liability on the part of defendant. I take the narrative of the case, as also of the one given immediately after it, from Mr. Campbell's book :—"The defendant had left a van with ploughing gear on the side of a road to stand there for the night. Deceased drove by along the road, and his mare, who, it appeared in evidence, was a confirmed kicker, shied at the thing, and then kicked and ran away, upset the deceased, and kicked him so that he died. It was held by Justice Denman that the act of the defendant in leaving the van was an unreasonable use of the highway, and that the death was the proximate and natural result."

In the following case, however, there was held to be no liability :—"In the case of *Sharp v. Powell* (L.R., 7, C.P., 253), the defendant's servant had, contrary to the provisions of the Police Act, washed a van on the street, and allowed some of the water used for the purpose to flow down the gutter about 25 yards off. The weather being frosty, a grating, through which the water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street, which was ill paved and uneven, and there froze. The plaintiff's horse, coming to the place, slipped and fell, and was damaged. It was held that, as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the act, the defendant was not responsible for what had happened."

In connection with this point as regards English law, reference may be made to Roberts and Wallace's work, pp. 346-362 inclusive, where numerous cases are given.

There are very few Scotch cases which touch the point referred to. It was alluded to by Lord Moncreiff incidentally in the case of *Campbell v. Ord*, quoted above. I incline to believe that the Scotch Courts would not be disposed to draw such fine distinctions as have been drawn by the English Courts, and that the question of liability would very much be determined by an answer to these two questions—Was there manifest fault, and did such fault bring about the accident complained of? Under the head, *Must servant's act be the immediate cause of the damage?* Lord Fraser gives the following short summary of his theory of the law, referring, however, only to two English cases. *Immediate* and *proximate*, I may remark, are, I understand, synonymous terms. "It is not necessary in order to attach liability to the master that the *immediate* cause of the injury should be a direct act of his servant. Thus, the owner of a vehicle was held responsible for the consequences of a collision, though at the time the accident happened his own servant was not driving, but had committed the reins to a friend (*Booth v. Mister*, 7 C. and P., 66). So, again, a similar decision was pronounced where the servant of a master-scavenger left his horse and cart unattended in the street, and an accident was occasioned by the act of a passer-by, who struck the horse, and so caused it to back the cart into a shop window." (*Illidge v. Goodwin*, 5 C. and P., 190.)

The decisions referred to were, it is to be ob-

served, pronounced more than half a century ago, and it certainly is open to argument that the damages which were awarded in both these cases was for injury not within the ordinary or probable consequences of the act or default complained of. There is, as we have seen, no doubt that the English rule of law is distinct, that it is only where it can be affirmed that the accident complained of was within the ordinary or probable consequences of the act or default complained of that a valid claim of damage for injury can lie, although there have been narrow distinctions drawn in holding on the one hand that the facts proved bring the case within the rule, and on the other hand that they place it outwith such rule.

## PART II.

I now come to the second head of subjects which I propose to discuss, viz. :—

II. *The liability at common law of employers to those employed by them for injury occasioned through the employer's personal fault, or through the fault of a servant or servants.*

The ordinary rules of common law with reference to this question are, I think, correctly set forth, generally speaking, by Lord Fraser in the second edition of his work on “Master and Servant,” p. 93, under the head, *Obligation to indemnify servant for injury sustained in the service* :—“The master must conduct his business in such a manner as not recklessly or unnecessarily to endanger the lives and limbs of his workmen, and if he, or those for whom he is in point of law responsible, act rashly or neglect to take proper precautions he is liable in damages for any injury that may follow. Along with this rule, however, there is another to be observed, viz., that the servant in entering into the contract is to be considered as contemplating and taking the chance of all ordinary risks properly incident to the particular kind of employment in which he engages. Even when the work is of an unusually dangerous description the same rules apply.



The master is bound to take all reasonable precautions which ordinary prudence would suggest, but as regards all risks beyond this the servant is supposed to forego any claim in consideration of the higher rate of wages usually stipulated for work of a dangerous description. The general rule, then, appears to be that on the one hand the master is responsible in damage for all injuries arising from causes which he might have foreseen and obviated, such as defects in his machinery, neglect to avail himself of appropriate appliances for preventing danger, appointing incompetent managers in positions of responsibility, working by an erroneous or unnecessarily dangerous system, and, in short, all risks which can be said to arise from his rashness, carelessness, or neglect, and not properly to be incident to the contract. On the other hand, if the servant has just as good opportunity of making himself aware of the danger as the master has, or if he be clearly aware of the danger and continues notwithstanding to work without remonstrance, or if he exposes himself to greater risks than is absolutely necessary for the proper performance of his work, or if he is acting contrary to orders, or even out of the proper line of employment at the time the accident happens—in these and similar cases he may lose his right of recourse which he otherwise would have against the master.”

I have given this somewhat lengthy quotation from Lord Fraser’s well-known work, because it gives, luminously and succinctly, what are undoubtedly the general rules of law applicable to the questions falling under this head of my subject. But these require to be investigated more particularly, and I propose to

consider the principal and, indeed, material points, under the following subdivisions:—

1. Under what circumstances are employers responsible at common law for accidents occasioned to their servants through plant or machinery?

2. What is the doctrine of *collaborateur*, and to what extent is the master liable for injuries occasioned through the fault of fellow-servants of the injured person?

3. In what cases must the servant be held to be barred from recourse for injury in respect of the risk being held to be one incident to the employment, or of his working in the face of a known danger?

*1. Under what circumstances are employers responsible at common law for accidents occasioned to their servants through plant or machinery?*

The rule of law is perfectly well fixed that a master is not to be held as warranting to his workmen the sufficiency of the machinery employed. He is bound, however, to use ordinary and reasonable care with reference to its sufficiency. He is not, on the one hand, responsible for latent defects in the machinery, provided these were such defects as could not have been discovered with the exercise of ordinary and reasonable care; on the other hand, he is responsible for injuries caused through patent defects, unless these were so plainly patent as to be in the knowledge of the injured workman, who then may be held to have worked on, accepting the risk.

With reference to machinery accidents, the case of *Weems v. Matheson* (17th February, 1860, 4 Mac-Queen, 215,) may be referred to. The following statement of the law by Lord-Chancellor Campbell

may be given:—"There is a clear allegation of negligence on the part of the defender with reference to insufficient strength or construction of the gland, and its being unskilfully applied to the purpose of sustaining the weight. To support that allegation it would be necessary not only to show that the machinery had been insufficient, but to show that this insufficiency did not arise from any inherent secret defect, but that it was known, or might by the exercise of due skill and attention have been known to the defender." In the same case Lord Wensleydale said:—"I take it to be perfectly clear that in these cases there is no warranty; all that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or by his workmen in a fit and proper manner."

I may also refer to a short passage from the judgment of the then Lord Justice-Clerk (Inglis, now Lord-President) in the case of *Ovington v. M'Vicar* (12th May, 1864, 2 Macp., 106). "The case is put on the simple ground that the machinery was defective and broke and caused the death. If that be so, then there was no liability on the part of the pursuer to the deceased's representative. I think there must be some *culpa* on the part of the master before he can be made answerable for injuries sustained by his workmen."

Certain recent decisions in the Second Division of the Court of Session have, I think, led to some confusion. It will be observed in the case of *Weems*, to which reference has just been made, that it was there laid down that to establish fault against a master for defective machinery, at common law, it was necessary not only to show that the machinery was insufficient, but that this in-

sufficiency arose from some defect that might have been known by the master by the exercise of due skill and attention. There are two cases occurring in the year 1882—namely, *Fraser v. Fraser* (June 6, 1882, 9 R., 896) and *Walker v. Olsen* (June 15, 1882, 9 R., 946), which contain dicta by the judges of the Second Division apparently inconsistent with the rule of law enunciated by Lord-Chancellor Campbell, or at least introducing an exception to the general rule. The rubric of the first of these cases bears:—"A workman engaged in attaching a lightning-conductor to a chimney stalk was killed by the breaking of a rope by which he was suspended. In an action brought by his representatives against his employer, who provided the rope, it was proved that the rope was of sufficient thickness, and had been used for several days in raising stones of 3 cwt. The proof did not disclose the defect which caused the accident, but evidence of skilled witnesses showed that it might have been caused by a 'nip' in the rope (a defect in the centre), which would have been detected by the hand of a skilled person, and that no such examination took place before using the rope, *held* that the employer was liable in respect that he had not caused the rope to be examined by a skilled person before use." Lord Moncreiff said:—"This is a very narrow case, and certainly the amount of negligence on the part of the defender is by no means enormous. In all probability he did what the majority of people would have done in the circumstances. He trusted to what he believed to be the satisfactory state of the rope, and so made no special examination of it. But when a man contracts to have work done which necessarily involves risk of human life, he must neglect no pre-

caution to secure the safety of the workmen. . . . On the authorities quoted to us *the fact of the rope breaking throws the onus on the person who provided the machinery.* This brings us to the greatest difficulty of the case, viz., what was the cause of the accident? It is clear that this rope was insufficient, and two theories have been advanced as to the cause of its insufficiency—first, that the rope had been cut; and, second, that it was rendered unsafe by a ‘nip.’ *As I have said, the onus of showing how the accident occurred is on the defender.* The principal evidence, and that which seems of most value, is that of the ropemaker, who attributes the failure to a ‘nip,’ which, he says, could have been discovered on examination.”

The opinions in the above case as being hardly consistent with the previously understood rule of law as to machinery were accentuated by those delivered in the case of *Walker v. Olsen* referred to supra, and delivered about a week after. The rubric of that case bears:—“*Onus of proving the cause of accident.* A stevedore, while engaged in unloading a vessel, was injured by the tackling with which the cargo was being raised falling upon him. The tackling was supplied by the owner of the vessel. It was impossible to say exactly to what cause the falling of the tackle was attributable. The evidence on the point not being satisfactory, *held* that the occurrence of the accident, along with the fact that no satisfactory explanation of its cause had been given by the owner, led to the conclusion that the tackling was defective, and the owner found liable in damages accordingly.” The rubric seems to give a fair summary of the ratio of judgment, and, it humbly appears to me, is not consistent with the



law as previously understood. The judgment appears to have been:—"We must hold, on the theory *res ipsa loquitur* (the accident itself speaks), that the machinery is proved to have been defective, and in these circumstances it must be held that the owner is in fault." At all events the judgment went this length:—*The machinery being proved to be defective in some unexplained way, it rests upon the master to show that he is blameless with reference to such defect, and his failure to do this infers liability.* As I understood, according to previous decisions, the onus of proving (*i.e.*, the burden of making out) that the machinery was defective for some reason for which the master was accountable, lay upon the party complaining, and if the cause and nature of the defect were unexplained the onus on the complainer remained undischarged.

A case came before myself shortly after the case of *Walker v. Olsen* was reported—*Hughes v. John Elder & Co.* It is unreported. In that case an accident had happened from some planking at the side of a ship on which pursuer was standing giving way. The reason of this remained unexplained. I considered myself bound by the law which I understood to be laid down in the cases referred to, and decided against the defenders. In the first part of my note I said:—"Latest decisions of the Supreme Court are of course binding upon the inferior judicatories, and the decision embodied in the above interlocutor is exactly the reverse of what I would have decided as matter of law, had it not been for the case of *Walker v. Olsen* (June 15, 1882, 9 R., 946). I understand the law, as laid down there, to be that where machinery is defective, and an accident happens in consequence of such defec-



tive machinery, *culpa* is presumed in respect of the defective machinery as against the owners, in the case at least where the nature and reason of the defect remain unexplained. I understood the law previously to be that owners did not guarantee safe and sufficient machinery, but that they were bound to take ordinary and reasonable precautions to see that the machinery was safe and sufficient, and in this view of the law there would, in my opinion, be no liability, for I think it is clear on the proof that all reasonable precautions had been taken by defenders to test the planks used by the men at work on the sides of the ship." The case was appealed to Sheriff Clark, who also held there was liability, and the case went no farther.

Much the same question, however, was brought up before the Second Division again in the case of *Macfarlane v. Thompson* (December 6, 1884, 12 R., 232). The rubric of that case bears:—"Where the cause of an accident to a workman is not ascertained, the fact that it has taken place will not raise a presumption that it was caused by a defect in the machinery or plant, for which the master was responsible, although it is not necessary to show the precise nature of the defect. *Fraser v. Fraser* and *Walker v. Olsen* explained." Lord Craighill, who gave the leading opinion, said:—"I am of opinion that it would be unfair in a case where the cause of the accident has been left altogether unexplained to call upon the defender to answer for its consequences as upon the footing that his machinery was in some way defective. The cases of *Fraser* and *Walker* have been referred to as giving support to this contention, but I do not think it is a fair interpretation of these cases to say

that it implies that where the cause of the accident is left in mystery the servant has made out his case against the master. . . . It would, I think, be very unfair to the master to hold that where the cause of the accident was unascertained, or it may be unascertainable, it is to be held that that cause must necessarily have lain in some defect in the machinery, and that the master must therefore be found liable." Lord Moncreiff said:—"I only add to what Lord Craighill has said a single sentence, for the purpose of explaining my meaning in the opinion I delivered in the case referred to. It has been sought to interpret these opinions as authority, to the effect that you must presume from the fact that if an accident has occurred, that there was some defect in the machinery. I do not think that any such interpretation can be put upon what I said there. What I did say was that, provided it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an onus is thrown upon the master to show that the defect was one for which he was not to blame. But that is a totally different thing from saying that you must infer faults or defects in the machinery where there is no evidence to the effect in any of the surrounding circumstances." Lord Rutherford-Clark concurred in Lord Craighill's opinion, and Lord Young was absent.

The last case is not inconsistent with Fraser or Walker's case, at least so far as the words I have italicized as the result of *Walker v. Olsen* are concerned, and the effect of these three cases is, I take it, this—that where a pursuer proves that an accident has happened through defective machinery fault

is presumed against the master, which can only be redargued by his showing what the defect is, and that it is one for which he is not responsible. It may be pointed out that the master would be able to escape liability by showing that the accident was due to a certain determinate latent defect; but if the accident be due to a defect which is so latent as to be undiscoverable, then he is liable. This appears to me to be rather an illogical result.

Scotch common law, then, appears to be that where an accident happens through some unknown and unexplained defect of machinery or plant the employer is liable. "An *onus*," says Lord Moncreiff, "is thrown upon the master to show that the defect was one for which he is not to blame." Unless the physician is able to diagnose the disease of which the patient complains, he cannot hope to cure it, and unless the lawyer knows what the defect is which has brought about the accident, in the general case, at all events, it is impossible to say whether such defect is one which infers that there has or has not been fault on the master's part. It is to be noted that the decisions in the cases of Fraser and Walker were not based on any supposed distinction between common law and the provisions of the Employers' Liability Act of 1880. The doctrine referred to was laid down as part of the Scotch common law. The decision in Fraser's case is, I think, reconcileable with English decisions, on the footing that the Court held it proved that an examination of the defective rope on the morning of the accident would have disclosed the defect, and that there was a failure on the part of the master of ordinary and reasonable care in not making such an ex-

amination; but the dicta of Lord Moncreiff, which I italicized, go somewhat further, while in the case of *Walker v. Olsen*, the decision is practically what I have stated above as the law which must now be accepted in Scotland.

No doubt it is English as well as Scotch law that where an accident happens through some defect in plant or machinery, which defect, it is held, would have been noticed and remedied if ordinary and reasonable care as to examination had been exercised by the master, there is liability on the employer's part. Thus in one case (*Webb v. Rennie*, 4 F. and F., 608), where an accident had happened through a scaffold-pole having given way, there was held to be liability, because the pole had become rotten through having remained for a considerable time in the earth without examination; and in another case, well known and frequently referred to (*Murphy v Phillips*, 35 L., T. 477), a chain having broken, and a stevedore having been injured thereby, he was found entitled to damages because it was held that there was a failure of ordinary and reasonable care on the part of the master in not duly examining the chain, which, if he had done, would, it is said, have disclosed that one of the links was worn out. (In connection, however, with this latter case, I may note in parenthesis that in at least one case before myself evidence has been led to show that in the interests of safety the testing of chains preparatory to use is in many cases inadvisable, because the chain may pass the test, but the strain, enormously above the weight to be applied to the chain in its ordinary use, may develop some latent defect which again may lead to accident.) But in

these English cases it is to be observed the defect was explained and known. In *Walker v. Olsen*, the defect remained unknown.

Again, with reference to the countenance given to the theory *res ipsa loquitur* (the accident itself speaks) as inferring negligence against the employer in *Walker v. Olsen*, it may be remarked that there is a certain class of English cases where at common law, *but only in a question with the outside public as against the employer*, effect has been given to the Latin maxim referred to. Thus, in the case of *Scott v. London Dock Co.* (34 L.J., Ex. 220), the following rule was laid down:—"There must be reasonable evidence of negligence, but that when the thing is solely under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen to those who have the management of machinery and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In the case of *Huxam v. Thoms* (Q.B.D., 19th January, 1882, not reported in the official reports, but to be found in "Law Times," 21st January, 1882, and referred to in Roberts and Wallace's "Duty and Liability of Employers") some countenance seems to have been given by Mr. Justice Field to the theory that the above rule had been imported by the Employers' Liability Act into cases where accidents had happened, and where the question was between master and servant, and did not merely obtain where a member of the outside public had been injured.

But the authority of that case is deprecated, and the following passage from the admirable work referred to



above of Messrs. Roberts and Wallace (third edition, p. 257) will, I think, very distinctly demonstrate that English common law in a question between master and servant declines to recognize any foundation for negligence founded on the maxim *res ipsa loquitur*. "Before the Employers' Liability Act, however, the maxim *res ipsa loquitur* could very rarely, if at all, be applied in an action for personal injury by a workman against his employer; as in every case it was necessary that the evidence should show negligence on the part of the employer personally. In this respect the Act has been said to have introduced an alteration in giving the workman the same remedies as if he had been a stranger. In *Huxam v. Thoms*, which was an appeal from the County Court by way of motion for a rule to enter a non-suit, the workman had been killed by falling off part of a scaffold called a runner. It was contended that there was no evidence that the employer, or any person for whose acts he was responsible, had been negligent, or that the scaffold was defective, and that the finding of the learned County Court Judge in favour of the plaintiff could not be supported. The Court, however, declined to grant a rule, holding that there was evidence for the consideration of the judge. And Field J., referring to the case of *Scott v. London Dock Company*, said:— 'Under the old law there would have been a good defence to the action, but this was just one of those cases within the meaning of the Act which the Legislature passed to alter the existing law.' It is submitted that the ruling in this case is at least one which must be cautiously applied, inasmuch as it is not every accident which will raise a *prima facie* case



of negligence, and the workman is often as capable of explaining the cause of the accident as the employer is. Moreover, the employer is not liable to his workmen for the negligence of all his servants, nor even, as has been seen, for the negligence of all those servants who have to do work upon or to repair the ways, &c., and under whose management the ways may in one sense be said to be. And, lastly, the dictum appears to be answered by the criticism on an earlier page, and to be entirely opposed to that which the authors have endeavoured to show is the true rule for the application of the Act—namely, that the *plaintiff must give evidence of a breach of a duty owed to the workman in his capacity of servant before he can claim the benefits of the Act.*”

This passage, therefore, points out that, as regards common law as between master and servant, the maxim *res ipsa loquitur* has practically no application, while it deprecates its application to cases under the Employers' Liability Act. I am not at present dealing with the statute. The passage referred to is quoted here to show that English common law is opposed to the decision in *Walker v. Olsen*.

Another point in connection with plant, and one of some importance, came up before the Second Division of the Court of Session in the case of *Rooney v. Allans* (July 17, 1883, 10 R., 1,224). In that case Sheriff-Substitute and Sheriff had decided in favour of the defenders on the ground of contributory carelessness on the part of the pursuer. The Second Division reversed, holding that contributory carelessness sufficient to bar the action had not been proved. The Judges, however, unanimously endorsed the Sheriff-Substitute's opinion

that as matter of law *culpa* must be held proved as against the defenders in the circumstances detailed in the following extract from the Sheriff-Substitute's (Mr. Erskine Murray's) note:—"The Sheriff-Substitute might have on the whole been unable to find that any liability in respect thereof attached to the defenders, had it not been for the fact that a proper examination of the link has been rendered impossible by the actings of defenders' stevedore, who flung it into the Clyde. This very indiscreet act shifts the onus of proving upon the defender, whose chief official thus excluded the possibility of a scientific examination. The Sheriff-Substitute, therefore, on this footing is obliged to hold that on this point the result of the evidence is adverse to the defender." The chain which had broken was thus not only held to be defective, but it was presumed against defenders that ordinary and reasonable care would have disclosed the defect.

I am not aware of any English case treating the same question, but I think that the theory of law given effect to in the above case is sound. It is true that, as in Walker's case, the defect remained unknown and unexplained, but the reasonable possibility of its being explained so as to have it determined whether that defect was or was not one for which the master was reponsible was prevented by a servant of the master. Of course, it may be said the stevedore was also, if a servant of the master, the fellow-servant of the injured party; still as a question of public policy no premium must be held out to the master to destroy, either by himself or servant, the only means of discovering the nature of the defect in the plant or machinery which led to injury.

Certain questions may come up in connection with plant or machinery under the category referred to in Lord Fraser's work under the heading *Master is liable if he knowingly conceals the danger*; and the same subject is dealt with in Messrs. Roberts & Wallace's work under the title *Master liable for concealed danger*. Both Scotch and English authors refer to a case where the servant of a butcher was ordered by his master to cut up the carcase of a diseased animal, and having done so was injured by the *virus*, the master knowing and the servant being ignorant of the danger of so doing (*Davies v. England*, 33 L.J.Q.B., 321). This case has, of course, no reference to machinery, but the same principle applies. Thus, if the master had knowledge or suspicion that it was unsafe to carry a certain load up a ladder owing to the latter's instability, and the servant was ignorant of the danger or risk, and the ladder gave way on the servant attempting to carry out his master's orders and injury resulted to the servant, the master will be liable (*Williams v. Clough*, 27 L.J., Ex. 325). Numerous cases of the kind can be imagined, *e.g.*, Suppose a master was anxious to get a safe upstairs to a certain room, and suppose he knew that its weight and that of the servants employed to carry it up made it a risk whether the staircase would not give way, and the servants were ignorant of any risk, and the staircase did give way and injury or death resulted, in such a case, I think, the master would be liable.

In the general statement of law which I quoted at the beginning of last paper from Lord Fraser's work, he gives as a ground of liability the fact of the master "working by an erroneous or unnecessarily dangerous system." In the English work just referred to the

same doctrine is formulated in somewhat greater detail, thus :—" *The master is bound to take due care to carry on the work or business under a proper system or regulations; and if through any want of, or defect in, such system or regulations of which the master is cognizant an injury occur to the servant, the master will be liable to an action for damages.*"

One of the typical instances given in Messrs. Robert & Wallace's work in illustration of this rule is that of *Sword v. Cameron* in 1839 (1 D., 493), "as explained," they say, "*in Bartonshill Coal Company v. Reid.*" The soundness of the decision in *Sword's* case, in view of more recent authorities, is open to argument. The injured workman must have been in the knowledge of the practice. I state the case in the words of the authors referred to:—"For example, when a workman was working at a crane in connection with some blasting operations, in which the regulation was to stand by the crane until the word 'fire' was given, and the servant, while running for shelter, was struck by a piece of rock; on it being shown that proper precautions were not taken to cover the shot, or that pieces of rock frequently flew over the heads of the retreating workmen, and, further, that the regulation under which the blasting was carried on was sanctioned by the master, it was held that the system being defective the master was liable."

In both England and Scotland there are cases in which mine-owners have been held responsible to servants for injuries brought about by defective ventilation of pits. The most recent case, I think, in which effect has been given to this view is that of *Goodwin v. Walkinshaw Oil Company* already referred to (Scot.

Law Rev., vol. i., 320). In that case, which originally came before myself, I did not think it was proved that there was any defective system of ventilation, but Sheriff Clark held otherwise, and the Second Division unanimously supported his judgment, awarding damages to the widow of a miner killed by an explosion. The mine-owner's liability for a proper system of ventilation is now, no doubt, statutory under the Mines Regulation Act; but, apart from that statute, liability has been found against mine-owners on the ordinary doctrine of common law referred to.

I may refer in further illustration of the topic I am dealing with to two of the most recent cases where an employer has been held liable for injury occasioned to a servant by what was held to be defective system or improper use of machinery—viz., the cases of *Welsh v. Moir* (February 4, 1885, 12 R., 590), and *Murdoch v. M'Kinnon* (March 7, 1885, 12 R., 810). In the first of these cases a man was killed by the pivot of a crane giving way. In this pivot there was a latent defect. At the time the accident happened the crane was being used in order to tear up the rails of a disused line of railway, which was admittedly a most unusual use to which to apply a crane. The crane had been used for some time, and the strain upon it when it broke was less than its guaranteed strength, but it had not been recently tested. It was held by the Second Division that the use of the crane was improper, and was the cause of the accident, and that the defender was responsible. Lord Young in that case said:—"It is according to the evidence, and the Sheriff-Substitute is of opinion, and I think rightly, that this was not only an unusual, but an unprecedented, use to put a crane to,



and, further, that it was an improper use." Lord Rutherford-Clark dissented in this case.

In the other case, to which reference has been made, a miner was killed by a brakesman mistaking as a signal what was merely an exclamation of one of the miners. The Second Division unanimously held (the Lord Justice-Clerk being absent), on a consideration of the proof, that the presence of a bottomer at the opening leading to the shaft and a proper system of signals were ordinary and reasonable precautions for the safety of miners which the employers were bound to have provided, and omission to do which rendered them responsible in damages to the widow. I may note the following passage in Lord Young's opinion, to show the ratio of judgment was based on the doctrine of common law with which I am dealing:—"I ought to notice that I desire to be understood as expressing no opinion that this was a place where, under the Mines Regulation Act, there must imperatively be a bottomer. I proceed upon the view, which I understand is the view of the Government inspector and the mining engineer, that the presence of a bottomer and the safer working of the signals was reasonably necessary for the safety of the men engaged."

In connection also with this point the dictum of Lord Chancellor Cranworth in the Scotch appeal *Brydon v. Stuart* (2 M'Queen, 30) may be given. That case, it is true, was decided on a different issue in the Court below—viz., whether the man injured was within the scope of his employment when the injury complained of was sustained, but the statement of the Lord Chancellor is generally applicable to



the class of questions with which I am at present dealing. He said:—"In my opinion not only is there that responsibility (on the master) by the law of Scotland, but clearly also by the law of England, which is thought to be less strict upon this point. A master by the law of both countries is liable for accidents occasioned by his neglect towards those whom he employs." *The question of liability on the ground referred to is very much mixed up with the question of whether, when the accident complained of happened, the injured party, IF OF FULL AGE, had accepted a risk incident to the employment, or that he was working on in the face of a known danger,* and I may require again to advert to similar cases in dealing with the third subdivision of my second head.

It was held, however, by myself, in the case of *McClure v. Hamilton* (which was affirmed on appeal by Sheriff Clark, and went no farther), that a master was liable for employing a child of eleven at a circular saw driven by steam, as being too dangerous a description of work to put a child of such tender years to; and I awarded damages to the boy for the loss of the fore finger of his right hand, which had been amputated by this circular saw.

About the same time the Second Division, in the case of *Sharp v. Pathhead Spinning Company, Limited* (January 30, 1885, 12 R., 574), decided in favour of the pursuer upon much the same grounds. Indeed, the latter case was a very much stronger one for the master, for there the girl, who was between thirteen and fourteen years of age, had been injured while engaged in a carding machine, but the injury had been occasioned by an act which was done in dis-

obedience to order. Lord Young said:—"I am of opinion that the defenders were in fault in putting this child to this work, and that her bodily injury is attributable to that fault. It is according to the evidence that such work for her was attended with danger. No doubt it would have been quite safe if she had acted with care and caution, and attended to the instructions given to her, a thing which might have been expected of her had she been older, but that is the ground of action, that she was of tender years, and that the defenders were in fault in putting her to the work; and I think that ground of action is established and is sufficient." The Lord Justice-Clerk was absent, but Lords Craighill and Rutherford-Clark agreed that liability was established on this ground, and decree was given for £100 of damages, the girl having lost her left arm through the accident complained of.

*2. What is the doctrine of Collaborateur, and to what extent is the master liable for injuries occasioned through the faults of fellow-servants of the injured person?*

The doctrine of "Collaborateur," as it is somewhat clumsily called, is simply this, that a master is not to be held liable where injury happens to any of his servants through the fault of some other person who is held to be engaged in common employment along with such injured person, subject to one exception, to be afterwards referred to. In the case of *Wilson v. Merry & Cuninghame* (29th May, 1868, L.R. 1 Scotch Ap., 326), Lord Colonsay said:—"I agree with what has been said as to the terms 'fellow-workmen' and 'colla-

borateurs.' They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist, and these expressions, if taken in a strict, limited sense, are apt to mislead. The same may be said of such words as 'foreman' or 'manager.' We must look to the functions the party discharges, and his position in the organism of the force employed and of which he forms a constituent part." The doctrine of law referred to may be explained on the following reason, as pointed out in cases to be subsequently referred to, that it is no part of the contract of the master, either expressed or implied, to warrant the servant against the improper or negligent acts of any of his fellow-servants.

In the case just referred to that great Lord-Chancellor Earl Cairns said:—"I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has, no doubt, been the negligence of a fellow-workman, but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand on higher and broader grounds. The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that which he (the master) has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his

business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant v. Webb*, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

The divergence and subsequent assimilation of the laws of England and Scotland upon this point furnish material for a lengthy chapter, which, however, I will endeavour to compress into a comparatively brief space. In England the great and very frequently referred to case of *Priestly v. Fowler*, in the year 1837 (3 M. & W., 16; 7 L.J., Ex. 42), ruled the law to be that the servant could not recover damages from his master for

personal injury when this had resulted through the fault of a fellow-servant. It has been often pointed out that Mr. Justice Willes, in giving a judgment in a subsequent case (*Gallagher v. Piper*, 16 C.B., N.S., 677), and Chief Baron Pollock, in the case of *Vose v. Lancashire and Yorkshire Railway Company* (27 L.J., Ex. 249), made statements that they understood the law laid down in *Priestly v. Fowler* had been impliedly recognized in the English Courts long before 1837. With reference to this point, however, Mr. C. P. Ilbert (since well known in connection with Indian legislation), in his evidence before the Select Committee on Employers' Liability in July, 1876, makes this statement:—"It has been stated subsequently by Chief Baron Pollock that, although the rule as to negligence of a fellow-servant was laid down for the first time in *Priestly v. Fowler*, yet it must have previously existed. All I can say is, that there is no trace of it in the law books at any earlier date than this, and no reference appears to have been made to it by the counsel for the defence in the case of *Priestly v. Fowler*. Yet it is hardly possible that he should not have referred to such a rule if it existed."

Commenting somewhat adversely upon Lord Abinger's judgment, Mr. Ilbert says—"I do not think that any distinct rule is laid down in the case. *Priestly v. Fowler* is cited as an authority for a rule for which it is not in reality an authority. The remarks of Lord Abinger are very loose, and a great many of them are equally applicable to other relations than the relation of master and servant. For instance, all those dicta about a negligent chambermaid and a negligent cook and so on are quite applicable to the



relationship between innkeeper and guest, and most of his remarks are equally applicable to the relation between carrier and passenger, and there is no reason why they should apply exclusively to the relation between master and servant." Lord-Justice Brett (now Lord Esher, Master of the Rolls) makes the following reference to Lord Abinger's celebrated judgment in his evidence before the same Select Committee:—"You are probably aware that these inconveniences and absurdities were pointed out in *Priestly v. Fowler* by Lord Abinger. Lord Abinger, who had been one of the greatest advocates ever known at the bar, had an advocate's talent, which mainly consists in the invention of analogies, and there never was a more perfect master of that art than Lord Abinger, and he took it with him to the bench; and I think it may be suggested that the law as to the non-liability of masters with regard to fellow-servants arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of *Priestly v. Fowler*."

The following is the leading passage of Lord Abinger's judgment which has ruled the law in England and America ever since, and the soundness of which was subsequently endorsed in the great Scotch case of *Reid v. Bartonshill Coal Company* (3rd July, 1885, 17 D., 1067; H. of L., 17th June, 1858, 3 MacQ., 266), to which I will refer at greater length farther on:—"If the master be liable to the servant in this action the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty or by the terms of his contract for all the consequences of negligence in a matter in which he is the principal is responsible



for the negligence of all his inferior agents. If the owner of the carriage is, therefore, responsible for the sufficiency of his carriage to his servant he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep, and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house whereby it fell and injured both the master and the servant by the ruins. The inconveniences, not to say the absurdity, of these consequences afford a sufficient argument against the application of this principle to the present case. But in truth the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is

not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment especially which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, *and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master than any recourse against the master for damages could possibly afford.*"

I have made the above quotation for a double reason. In the first place, to show the theory of law upon which the judgment proceeded, and in the second place, to point out by the words italicized that the judgment, apart from any theory of law, is commendable on grounds of public policy. No contrary decision was pronounced in England subsequent to 1837. But the law of Scotland, where even before 1837 decisions to a contrary effect had been given, continued for more than twenty years to be exactly the reverse. By repeated decisions it had come to be regarded by

Scotch lawyers as settled Scotch law that the master was liable for damages on account of injuries sustained by a servant through the fault of his fellow-servant. Mr. Burns, of the firm of Burns & M'Lean, a well-known Glasgow lawyer of indomitable perseverance and ability, determined to bring the soundness of this view to a test in the House of Lords. He acted for most of the mine-owners of Lanarkshire, who were very largely interested in this question, large liabilities having been incurred by many of them by the application of this theory in both the Sheriff and Supreme Courts, as well as in numberless cases which never got the length of litigation. The case which assimilated Scotch and English law on this question is the case of *Reid v. the Bartonshill Coal Company*, decided in the year 1858 in the House of Lords, and referred to *supra*.

I take from the evidence of Mr. C. P. Ilbert before the Select Committee on Employers' Liability for Injuries to their Servants, the following very distinct summary of the effect of this judgment:—"What the case of the Bartonshill Coal Company *v. Reid* decides is this—First, It recognizes and confirms the English and American doctrine that a master is not responsible for an injury to one of his workmen caused by the negligence of a fellow-workman engaged in a common work, and overrules the decisions of the Scotch Courts so far as they conflict with this doctrine. Secondly, It recognizes the principle established by the judgment in *Brydon v. Stewart*, that a master who employs his servant in a work of danger is bound to exercise due care in order to have his tackle and machinery in a proper condition so as to protect the servant against

unnecessary risk. Thirdly, It appears to recognize the doctrine laid down in another case which I have not mentioned—the case of *Tarrant v. Webb*—that it is the duty of the master to get competent servants, but it throws upon the person injured the burden of proving that the employer had failed to exercise due care in the selection of his servants.”

The leading opinion in this case was given by Lord Cranworth, who endeavoured, I think unsuccessfully, to make out that there was no series of Scotch decisions to a contrary effect. But, as admittedly acknowledged by all Scotch jurists nowadays, he was right in holding that if such was the theory of Scotch law it was based upon an erroneous principle. This case was brought before the House of Lords in 1856, and Lord Cranworth took two years to consider his celebrated judgment. Two cases were brought up before the House of Lords at the same time—viz., the *Bartonshill Coal Company v. Reid*, and the *Bartonshill Coal Company v. Maguire* (3 MacQ., 300), and in the second of these cases, as Mr. Ilbert says, “this judgment of Lord Cranworth in the first of the Bartonshill cases was followed and confirmed by the judgment of Lord Chelmsford and Lord Brougham.”

Still, however, an important question remained undetermined authoritatively, even in England, at this time—viz., whether a person in the position of a foreman was to be regarded as the fellow-servant of a master’s inferior workman, although, no doubt, in England the current of decision was generally to the effect that a person in a superior position fell so to be regarded. Referring to this point, Mr. Ilbert said :—“ It appeared to the Scotch judges that such a person might fairly be

held to be rather the agent or the representative of the master than a fellow-servant with the ordinary colliers. That was the view taken by the Scotch judges in the case of *Somerville v. Gray* (1 Macp., 768). It was held that the person who had been guilty of negligence in that case was not a fellow-servant of the person injured, but was the representative of the mining company, as the mine-owner, and accordingly that the mine-owners were responsible for the injury done through his fault or negligence." He then goes on to refer to the case of *Wilson v. Merry* (H. of L., 6 Macp., 84; C. of S., 5 Macp., 807), which is the leading authority in English as well as in Scotch common law with reference to the question of whether or not a foreman is to be regarded in the position of a fellow-servant with the ordinary employés of the master. As the Scotch view of what the law ought to be on grounds of public policy has been now endorsed by the provisions of the Employers' Liability Act, perhaps it may be interesting to narrate the case and the effect of the judgment, which I cannot do more clearly or succinctly than in Mr. Ilbert's words:—"The case was this. One Wilson, a miner, had been killed by an explosion of fire-damp, which appears to have been caused by the erection of a platform which impeded the free circulation of air in the pit. It appears that the general manager of the defender's works in Lanarkshire was a Mr. Jack. The manager of the Haughhead coal-pit underneath Jack was John Neish, and subordinate to Neish was a man named Bryce, who attended to the underground operations. One Neil Robson, formerly a mining engineer, was a partner with the respondents, and it was under the general direction of the respondents, and



of Robson and Jack, that the working of the Pyotshaw seam was commenced. The charge of sinking the pit and making arrangements underground for working it was given to Neish. It was proved at the trial, and, indeed, not controverted, that Jack and Neish were competent persons for the work on which they were engaged, selected by the respondents with due care, and furnished by the respondents with all necessary materials and resources for working in the best manner. Under the circumstances the relation between the person who was injured and the person who immediately caused the injury was left as a question of fact to the jury. The Scotch judge (Lord Ormidale) declined to decide whether he was or was not a fellow-workman with the person injured. He left the question to the jury—that is to say, he did not go so far as the judgment in the case of *Somerville v. Gray*, but left the whole question to the jury. That case was taken on appeal to the House of Lords, and was decided by the House of Lords in 1868, . . . and may now be regarded as the leading case on the subject in the English and Scotch Courts, and the law there stated is the law which has ever since been regarded as binding. The effect of the decision has been, first, to reject the view that the foreman might be considered the delegate of his employer, or that the question of his position might be left to the jury; secondly, to enforce the wide meaning which the English judges had given to the term ‘common employment’; for instance, Lord Cranworth observes:—‘Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority,’ and lastly, to place the doctrine of the master’s immunity on broader grounds,



and to show that the true criterion is not whether the person causing and the person suffering from the accident are fellow-workmen in any strict sense of the word, but whether the damage was within the risk incident to the service undertaken for reward; that is to say, the rule is based not on the phrase 'common employment,' but on the meaning of the contract, on the terms expressed or implied in the contract between the employer and the person employed."

The decision, then, in *Wilson v. Merry* in the House of Lords ruled authoritatively, both for England and Scotland, that a person in superintendence, or in common *parlance* a foreman, was equally to be regarded as a fellow-servant with servants of inferior grade where he was paid as a servant by the common master. Although it may be that the current of English decision generally was to the effect that servants in superior situations were not to be regarded as the master's delegates, but still as servants, this question had not till this time been authoritatively decided in English practice. Indeed, the case of *Murphy v. Smith* (19 C.B.N.S., 361) is probably inconsistent with *Wilson v. Merry*, and there is no doubt it is opposed to the Scotch cases of *M'Aulay v. Brownlie* (22 Dunlop, 975) and *Somerville v. Gray* (1 Macp., 768), which are both judgments pronounced subsequent to the decisions in the cases of *Reid* and *Maguire* respectively *v. the Bartonshill Coal Company*. The case of *Somerville v. Gray*, just referred to, was a case which came up before the First Division of the Court of Session, and in this case Lord Colonsay, then the Lord-President, made the following remarks:—"The difficulty we had in the *Bartonshill* case and in some others was in drawing

the distinction between certain classes of servants—who is to be regarded as a fellow-servant and who as another kind of servant or employer. The question arises in this case—Was the underground manager a fellow-workman of the pursuer? We have had occasion to consider that kind of question in more than one case, and I have on more than one occasion ventured to remark that the difficulty of defining this phrase ‘fellow-workman’ or ‘collaborateur’ is mainly to be ascribed to the discrepancy between the judgments that have been pronounced here and those that have been given in the other end of the island. I think there is room for a distinction among different classes of servants acting under the same master, and I do not think that the House of Lords or the Courts of England have ever held expressly that there is not.”

In the Second Division, however, in the case of *Wright v. Roxburgh and Morris* (26th February, 1864, 2 Macp., 748), a different view was taken, although it is true some of the learned judges attempted to draw a distinction between that case and the case of *Somerville v. Gray*. The case of *Wilson v. Merry & Cuninghame* came up in the First Division (31st May, 1867, 5 Macp., 807). At this date Lord Glencorse, who was the head of the Second Division at the time the decision in *Wright v. Roxburgh & Morris* was given, had succeeded to the office of Lord-President on Lord Colonsay’s elevation to the House of Lords, and his views seem to have been adopted in the Court. Lord-President (Inglis) said—“The relation between Neish and the defenders was the same as subsists between a master and his stud-groom—if he keeps a great stable—or between a master and his head-gardener—if he

keeps a great establishment of that kind ; for both these superior servants have many people working under them, and frequently have the power of engaging and dismissing them at their pleasure." We have already seen what was the decision in the case just referred to in the House of Lords, and as Lord Fraser says, referring to Earl Cairns's judgment, a passage of which we have quoted on p. 63, the judgment was affirmed, " apparently on somewhat broader and more general grounds."

The law, then, of both countries was put beyond doubt by *Wilson v. Merry*—viz., that wherever an accident happened to the servant of a master through the fault of a fellow-servant, whatever the grade of the latter, there was no liability on the part of the master at common law. This statement, however, falls to be coupled with an exception, which is the exception referred to at the outset of the remarks on the doctrine of collaborateur. *The master must use ordinary and reasonable care in the selection of competent servants.* The duty is reasonably imposed on him of seeing that in work requiring skilled labour, and where servants of his have to act under the direction of a skilled workman, or in connection with a skilled workman, he has exercised, either by himself or some deputy, reasonable care in ascertaining whether such supposed skilled workman is competent for the task he has undertaken.

Thus, in the case of *Wilson v. Merry*, when the case came up in the House of Lords, Lord Colonsay said :— " Culpable neglect in supervision, if the master takes the supervision on himself, or where he devolves it on others, the *heedless selection of unskilful and incompetent persons for the duty*, or the failure to provide or

supply the means of providing proper machinery or materials, may furnish grounds of liability." In England, as noticed in Earl Cairns's judgment in *Wilson v. Merry*, liability for the failure to exercise ordinary care in the selection of competent workmen was recognized in the case of *Tarrant v. Webb* (18 C.B., 797), and approved by him. The theory upon which this rule of law proceeds is that which was laid down in the case of *Hutcheson v. York, &c., Railway Company* (19 L.J., Ex. 296), viz., that each servant has a right to expect that his employer shall not expose him to an extraordinary risk through the employment of incompetent persons either for superintendence or to join in the work. As, however, explained in *Tarrant v. Webb*, a failure of duty is only established against the master where it is held that he has been guilty of negligence in the employment of incompetent persons. He is not supposed to warrant the competency of the persons employed by him. To hold otherwise would be unjust if *fault* be the criterion of liability, and the following passage in Messrs. Roberts and Wallace's work, pp. 143-144, will, I think, be recognized as only fair and reasonable:—"It is obvious, however, that a competent person may be guilty of negligence, and there is considerable truth in the remark that sometimes the most competent people are the most negligent, whether out of carelessness, or temper, or negligence in the real sense of the word (per Dowse B. in *M'Carthy v. British Shipowners' Company*, 10 L.R., Ireland, at p. 392), from which it follows that the mere fact that a servant was negligent in the work upon which he was employed is not in itself sufficient to justify a jury in finding that the

master was guilty of negligence in employing him " (*Byrne v. Fennell*, 10 L.R., 392, Ireland).

In illustration of the duty imposed upon the master in the selection of competent workmen for labour requiring skilled knowledge, I may give a reference to an important Scotch case which came up in the year 1871 (*Stark v. M'Laren*, November 2, 1871, 10 Macp., 71). The facts of this case were as follows:—The roof of part of a chemical work having fallen in, the proprietor instructed the manager of the chemical department to employ the labourers in the work to remove the broken roof and to clear away the rubbish. One of the labourers so employed was injured by the fall of a gable during the operations. For the injury so sustained, the injured man raised an action against his employer. The plea was taken that the man had been injured through the fault of the manager of the chemical department, a fellow-servant, or collaborateur. Lord Benholme gave the leading opinion, which was concurred in by Lords Cowan and Neaves (the Lord Justice-Clerk being absent), to the effect that there was fault on the part of the defender in sending the labourers to work without ascertaining from persons skilled in building whether it was a safe thing to do.

I may give the following extract from Lord Benholme's opinion:—"Now, in the first place, the proprietor of a dangerous tenement abutting on a lane or roadway is responsible for injury to any passenger going along the roadway; and, in the second place, a master employing workmen to perform a duty of danger must either superintend it himself or employ some one to superintend specially skilled in the parti-



cular work. The defender did not do so. He went away and left his son in charge. It is not proved that he had any special skill in the operation entrusted to him. This is not a question of collaborateur at all." This case strikes us as a very apposite one with reference to the question with which we are dealing. The master in this case having faith in the ability of the foreman in a particular department, entrusted him with work which required a special description of knowledge. The master was unable to show that he had taken ordinary and reasonable care in ascertaining his capability for this special work, and injury having resulted from the foreman's incompetency the master was held liable.

An important case, or rather series of cases, came before myself recently. A certain building of concrete in the course of erection had fallen in and killed and injured several workmen. Liability was admitted on the part of the defenders. The job had been entrusted to the superintendence of a foreman merely, and the theory I believe on which liability was not contested was that it was one which required the skilled knowledge of an architect. There is no report of the cases (*Donnelly, Bonar, and Strachan v. D. F. & J. Alexander*).

Reference may also be made to the later Scotch case of *Robertson v. Brown* (May 17, 1876, 3 Macp., 752). It was a First Division case. The rubric sufficiently explains the ground of judgment:—"When a master orders a labourer to do a piece of work out of the line of his ordinary employment, which could with safety be done only by a skilled workman, the master is responsible should any accident happen to the workman."

As will be seen later on, a master under the Employers' Liability Act may be responsible for the fault of a competent foreman in selecting an incompetent man for a particular job when, through the fault of the latter, a fellow-servant has been injured; but at common law there is no such liability, provided, at all events, it be held that the selection of such person for the job was one which fairly fell within the functions of the foreman. Reference may be made to the English case of *Smith v. Howard* (22 L.T., 130).

Another point mixed up with this same question is where the master himself personally interferes with the work. Thus, for instance, where the master has appointed a competent foreman for whose acts or omissions he would not be personally liable if an injury happened to a servant, in a case where he himself appears upon the scene and gives directions or takes superintendence, and injury has resulted through some fault of his, he will be liable to his servant for the damage thereby sustained. Thus where a master interfered with the construction of a scaffold, and ordered certain materials to be used which it was held were unsafe and improper materials, the master was held responsible for an accident which had happened in consequence (*Roberts v. Smith*, 26 L.J., Ex. 319).

So also in a case where the master, having taken upon himself the functions of one of his employés at a pit, through his negligence permitted one of his servants to be injured, was held personally responsible (*Ashworth v. Stanwix*, 30 L.J.Q.B., 183). Lord Fraser lays down the same rule of law, and gives a reference to an English case of an earlier date. The cases referred to are English cases, but there can be no doubt

that the rule of Scotch law is the same; the case of Robertson mentioned at page 78 may also be referred to in this connection. Indeed, as regards Scotch law, it goes without saying that every person is liable in damages for his manifest personal fault, whether it be an act of omission or commission. A master cannot make himself a fellow-labourer along with his own servant.

Such, then, are the general results of the case of *Wilson v. Merry*; but it may perhaps be asserted that while that case brought up Scotch law at its date to a level with English law, the former has now travelled beyond the latter in its application of the doctrine of common employment. In one of my earlier pages I referred to the law as laid down in the case of *Woodhead v. the Gartness Mineral Company* and *Wingate v. the Monkland Iron Company* as establishing the doctrine that where a person is injured through the fault of the servant of A—he himself being not the servant of A at the time of the accident complained of, but the servant of B—still damages cannot be recovered from A on the ground that A and B were at the time engaged in one common employment. The cases principally referred to in support of this theory of law in *Woodhead's* case were, I think, *Wilson v. Merry* and *Wiggett v. Fox* (11 Ex. 832). In the case of *Rourke v. the White Moss Colliery Company* (1 C.P.D., 536), Lord Coleridge said:—"Practically and substantially the case is undistinguishable from *Wiggett v. Fox* and *Murray v. Currie* (L.R. 6, 24). In both these cases in a certain sense the person by whom the injury was done was not in the employ of the defendant. Yet the Courts held that for all practical purposes

there was community of employment of both the plaintiff and the person whose negligence caused the injury. The case with which we have been most pressed is *Abrahams v. Reynolds* (5 H. and N., 143). I must admit that it is very difficult upon the facts of that case to distinguish it from the cases to which it is opposed. The Court did, however, distinguish them, but whether or not the facts warranted it is another question. . . . Upon the authority, therefore, of *Wiggett v. Fox* and *Murray v. Currie*, I am of opinion that the defendants in this case are entitled to judgment."

Lord Chief-Justice Cockburn, however, in the same case said:—"It is quite unnecessary to say whether the case of *Wiggett v. Fox*, which was relied on for the defendant, was rightly decided. My own view is that it was not. . . . When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he was lent, although he remains the general servant of the person who lent him." Messrs. Roberts and Wallace take up the view that the Lord Justice-Clerk Moncreiff was right in his dissent from the other judges in *Woodhead v. Gartness Mineral Company* on a consideration of English case law. They say (p. 195):—"But it is submitted that upon a review of the English authorities this doctrine cannot be supported, and that the opinion of the Lord Justice-Clerk dissenting is correct, viz., that in every case to exempt the master of the wrongdoer from liability *there must not be only co-operation in the work, but also a common master.*" (The italics are mine.) Later on,

after reviewing cases in some detail, they say (p. 198): —“ Upon the above cases, therefore, it appears that while the decision in *Wiggett v. Fox* may be supported on the grounds given by Channell & Martin, B.B., in *Abrahams v. Reynolds*, viz., that the plaintiff was in fact in the service of the defendants, the decision in *Woodhead v. Gartness Mineral Company* is not in accordance with the English authorities, being founded on a mistaken view of *Wilson v. Merry*; and that it cannot be maintained even upon the ground of *control*, for the evidence of control, upon which the Court relied, consisted only in superintendence as to ventilation, etc., under the statutory rules, and not as to the mode in which the workmen were to execute the work.”

“Control,” which I have italicized in the above passage, is simply, as I understand, one of the legal symbols of mastership. Where control is absolute the relationship of master and servant is indisputable, but control may be more or less in amount. “In considering,” says Messrs. Roberts and Wallace (p. 78), “the right of control in connection with the existence of the relationship of master and servant, the right may be evidenced in many ways. It may appear, as we have seen, upon the face of the written contract under which the work is being carried on, and it will then of course be a matter of law to be determined by the Court alone. But in the majority of cases either the written contract is silent as to the question of control or there is no written contract to refer to, and it would appear on principle that then it is for the jury to say what amount of control the defendant had, or was entitled to exercise if he chose, over the actual wrong-



doer, and for the Court to say whether the control so found to exist is sufficient to establish the relationship of master and servant." There can, however, be no question that the case of *Wingate v. Monkland Iron Company* (Nov. 8, 1884, 12 R., 91) had nothing whatever to do with the question of control. In that case, which has already been referred to, it will be remembered that the apprentice to a firm of mining engineers who went down a pit was injured by the carelessness of a fireman of the lessees of the pit. He brought an action against the lessees, and was unsuccessful, the ground of judgment being that it was no part of the lessees' contract with the pursuer, who was in the pit for the purpose of making a plan, to guarantee his safety from the rashness or fault of other men who were also working in the pit. Clearly, therefore, in this case it is impossible to argue that Wingate was either a servant of, or under the control of, the pit lessees.

It may at this stage be convenient to exhaust the question of the master's non-liability or liability *under the plea of collaborateur* (for a plea founded on the doctrine of collaborateur has been in certain cases used against him under the Employers' Liability Act), so as to make it unnecessary, when I am dealing later on with the statute, to take up the question again. In an able article, written by Mr. Younger, advocate, and which appeared recently in the *Scottish Law Review*, "*On some recent decisions under the Employers' Liability Act*," it was pointed out how the plea of collaborateur, instead of being a plea of defence, had been made a plea for a pursuer complaining of injury. From that article I take the liberty of extracting the

following pregnant passage :—" The employer's great weapon of defence has been turned against him, and attempts have been made to make it as prejudicial to him under the new *régime* as it was beneficial to him under the old. As the Act was introduced to take away from the master in the cases to which it applies the defence of *collaborateur*, it is argued that the relation of master and servant to which its provisions are applicable is not that well-known and definite relation to which its own terms limit it, but an indefinite and far-reaching relation which can only be defined in this way—viz., that it embraces all those relations between master and workman to which at common law the doctrine of *collaborateur* extends. In a word, the contention is that wherever at common law the master could say to the injured man, ' You are the fellow-servant of my servant and therefore my servant,' the injured man can now say, ' You are the master of my fellow-servant and therefore my master'; and whereas in the former case the *sequitur* is, ' I am liable to you for my own fault only,' the *sequitur* in the latter case is, ' You are liable to me in those cases provided for by the Employers' Liability Act.' The argument has at first sight an appearance of great plausibility. It seems undeniable that if A be B's master, B must be A's servant. But if we bear in mind the fact that the name of a doctrine is often a very bad index to its principle, and that notably this very doctrine under consideration has, since its introduction into our law, suffered in precision from the inadequacy of its name, it will be at once apparent that we must not be led to a hasty conclusion from a *prima facie* identity which perhaps exists in the lan-

guage used alone, and not in fact. . . . If the argument be held good, it is quite obvious that it would extend the benefits of the Act to many persons to whom, if the definition of a workman in the Act is of any value at all, it was never intended to apply. The term 'workman' in the Act includes a railway servant and any one to whom the Employers and Workmen Act, 1875, applies, and that Act applies to any workman, not a domestic or menial servant who is under a contract of service, or under a contract personally to execute any work or labour. But if the argument be held good the Act will apply to 'contractors, sub-contractors, and their servants,' to 'everyone who enters a work, whether as a permitted visitor, actuated only by curiosity or by love of science, or as a workman who accepts employment there.' It will apply not only to workmen, but to 'friends who visit them, members of a family or their guests or visitors, or any of the members temporary or permanent, of any organization or establishment in which all, however variously occupied, are working towards one common end or purpose.' . . . On the other hand, if the argument be rejected as utterly fallacious, and the Act be applied strictly to those workmen who are included in its definition, we are confronted with the injustice, real or apparent, of the case in which the master could in an action, laid both at common law and under the Act, plead as a defence to the conclusions at common law that the pursuer is his servant at least within the meaning of the doctrine of *collaborateur*, and as a defence to the conclusions under the Act that the pursuer is not his servant."

The case of *Morrison v. Baird & Co.* (Dec. 2, 1882,

10 R., 271) is an important authority in favour of the workmen's view. In that case, which was an action directed against ironmasters, a man had been killed while working in a limestone pit. It was averred that the deceased was killed through a fall of rock, which again was said to be due to the fault of the defenders, or of the general manager, or of the underground manager, or of a certain J. M., who had a contract to excavate a certain portion of the limestone. The pursuer averred "the whole work in the Westfield Pit is carried on under the control and supervision of a general manager, and a staff under him appointed and paid by the defenders. This general manager, Mr. William Cameron, is non-resident, but comes to supervise the works once a week or thereby. Under him John Campbell acts as underground manager, and is constantly in the pit. These managers and the staff employed by the defenders have the whole control and management of the works. They have the power to employ or dismiss any of the men in the pit, and to order any portion of the work to be done or to be stopped. The character of the work to be done is very hazardous, chiefly owing to the great height and steep dip of the limestone seam. The mine is worked under the Metalliferous Mines' Act, 1872." The fault alleged was the "defective and insufficient arrangements made by the defenders for carrying on the works."

The defenders, on the other hand, pleaded that M'Intyre, who paid the deceased, was not the servant of the defenders or under their control, but was an independent contractor. "It was the duty of the said James M'Intyre to have

excavated said face in a proper manner." The case came up in the Court of Session on the adjustment of issues, and Lord Young said :—" The defender's argument came to this, that a workman in the position of this workman must fall between two stools. At common law he is a workman to whom the doctrine of collaborateur applies, and if he is injured by a person in the employment of the *head master* he shall have no remedy, although that *head master* did not employ him, but a servant of that head master. It would be held that he was a collaborateur to whom the doctrine of collaborateur applied at common law, and that there could be no action against the master by one workman through the neglect of another. Now, we know that the statute was introduced to afford a remedy against that rule in certain cases specified by the statute. . . . The aim is to construe the statute liberally, so as to make the remedy co-extensive with the mischief; and it was conceded that if the words admitted of it, and we construed the statute liberally, the remedy would apply to the pursuer's case." Lord Craighill agreed with Lord Young, and the Lord Justice-Clerk approved of the case being sent to the jury; but Lord Rutherford-Clark said:—" I think it would be inexpedient to send the case to trial in which there was not made some relevant averment of contract of service, or at least of facts, from which the relation of master and servant might be inferred, and on which the pursuer might rest the case at common law." He added, however, that he did not differ from the form of judgment proposed, under which an issue was approved for jury trial.

I have italicized the word "*head master*" which



Lord Young used in the quotation I made from his judgment. Of course, if the assumption be made that the relation of master and servant subsists, the question, it seems to me, is at an end. The question really was, Are the defenders in point of law, having regard to the facts averred, to be regarded as masters of the injured party and of the injured man?

The more recent case, however, of *Robertson v. Russell* (February 6, 1885, 12 R., 634), which also came up in the Second Division, I think would rather seem to show that the Court is not prepared to go the length of holding the master responsible in all cases in which it is arguable that the words of Lord Young might be held generally to apply to. It is, of course, to be noticed that the case of *Wingate v. Monkland Iron Company* had been decided between the dates of *Morrison's* and *Robertson's* cases; and the principle of decision in *Wingate's* case may perhaps have modified the expression of opinion previously made in *Morrison's* case. In *Robertson's* case, which was raised against a coalmaster by the widow of a miner who had been killed, it was held that as the deceased had not been in the employment of the defender, *and as there was no duty to the deceased incumbent on the defender, which he had failed to perform*, the defender was not liable in damages. The defender in this case had made a contract with two brothers of the name of Muir, by which the latter agreed to sink a shaft. The deceased was paid by the Muirs, and neither the defender or his manager took any superintendence in connection with the sinking of the pit. Sheriff Birnie, in his note, said:—"The Muirs were the contractors for sinking the shaft, the defender and his manager having no right to

interfere except to see that the contract was carried out. The defender, therefore, is not liable." All the judges took this view.

No doubt, in connection with the Mines Regulation Act and the special rules in force in every pit, an argument is open in those pit cases that a master cannot shake himself free from responsibility in connection with all the operations conducted in a pit on the ground that the Act and the special rules place these under the direction of managers or oversmen, and certain descriptions of work and certain responsibilities cannot be delegated so as to free the master from liability.

In Woodhead's case this argument was submitted:—"Every mine must be held as one organization, and it is illegal to treat it otherwise, and as one official is set over every one in the mine, such a relation was established between all the workers in the mine as to make them all fellow-servants. These special rules were the law of the mine, and that being so none of the persons employed in the mine could be held to be strangers to one another. *The test was, were they all under the control not necessarily of the same master but of the same employer.* Here all in the mine, overmen and miners alike, were subject to the control of the owners of the mine. All matters, such as when the miners were to go to their work, carry it on, or leave off working, were under the control of the owner of the mine, the control of the lessees."

The argument for liability in Robertson's case was no doubt based on the general theory here advanced; but this, it will be observed, has been refused effect to. Still, Morrison's case would seem

to show that where, in an action brought under the Employers' Liability Act, palpable fault is libelled against the oversman or manager of a pit, the owner will not be allowed to escape liability on the ground that the pursuer was not paid by himself, and that in a certain sense the relation of master and servant did not subsist between them. The question is in any view a narrow one, and the doubt indicated in the passage of Lord Rutherford-Clark's opinion which I quoted might not improbably lead to a different result if the same point were again brought up in another case in the Court of Session or House of Lords. The decision, however, is, of course, in the meantime binding on the Sheriff Courts.

While, however, there may be argument as to the personal responsibility of an employer to a miner injured through the fault of an oversman or foreman, on the ground that though the injured party was not, in the ordinary sense, the employer's servant, he was still under his control, such an argument is inapplicable to such a case as that of *Wingate v. Monkland Iron Company*.

The decision in *Wingate's* case was repeated practically in the case of *Maguire v. Russell* (June 10, 1885, 12 R., 1071). There A, who was a labourer in the employment of a firm who contracted to lay the cement flooring of a building in course of erection, was injured by a hammer let fall through the roof, said to be by the fault of a workman in the employment of B, who had undertaken to execute the plumber work of the same building. In an action of damages against B by A, the defence of common employment was sustained, the judges all holding that the case was ruled by the decision in *Woodhead's* case.

In a case, however, which came up on the same day, and in which effect had been given to the same plea in the Sheriff Court, the Court, reversing the judgment appealed against, drew a distinction between the two cases. The case referred to is that of *Gorman v. John Morrison & Son* (June 10, 1885, 12 R., 1073). In that case a servant in the ordinary employment of the Caledonian Railway Company was, as averred, while storing sleepers in a shed belonging to the Company injured by the fault of a servant in the employment of the defenders, who had a contract with the Railway Company to repair the roof of the shed. In that case Lord Kinnear, who had been called in to make a quorum of the Second Division, put the case thus:—"The averments of the pursuer in the last case disclosed that the pursuer and the contractor's servant who injured him were engaged in the erection of the same buildings, and that involved the principle in *Woodhead's* case. The pursuer's averments here do not disclose any employment, which in any reasonable sense can be said to be common to him and the servant of the contractor. They were not servants to the same master and were not engaged in the same work." It occurs to me that almost the same words could have been used with reference to the pursuer in *Wingate's* case.

No doubt, as pointed out in the last paragraph of the article from which I quoted above, anomalous results follow from the different decisions to which I have referred. Indeed the very anomaly predicted in the article occurred in a case which came before me recently (*Nicol v. Craig*)—not reported. In that case I held that the pursuer, who was the servant of a grain-

weigher, had been injured by the fault of the foreman of a stevedore. The action was brought against the stevedore. The stevedore's men raised the grain to a certain height in the ship; it was then taken by the grain-weigher's men, and was weighed and taken ashore. I held there was no action at common law on the ground that there was community of employment on the authority of Wingate's and Maguire's cases, and on the other hand that there was no liability under the Employers' Liability Act, because the relation of master and servant did not subsist between the defenders and the injured man.

I concluded my note thus:—"I admit that there appears to be an anomaly in the state of the law, which holds, on the one hand, that masters are responsible for the fault of their foremen for injuries sustained by servants in their employment, and that also masters are responsible to the public for injuries sustained through the fault of any of their servants acting within the scope of their authority; while, on the other hand, excluding any claim of damage at the instance of a man not a servant of the defenders injured through the fault of the foreman of the defenders on the ground that he is engaged in a common employment with such foremen, still, I take it that there can be no doubt that this is the law. It is not my province to deal with the question of whether this is or is not a matter requiring remedy." This case was appealed to the Court of Session direct from my judgment, but, I believe, was extra-judicially settled.

*3. In what cases must the servant be held to be barred from recourse for injury in respect of the risk*



*being regarded as one incident to the employment or of his working in the face of a known danger.*

There can be no doubt that in actions laid on the Employers' Liability Act the ordinary rules of law with reference to the class of questions indicated in the above head have to some extent been altered by the provisions of the statute, but after consideration I have thought it advisable to deal with the matter here only from the common law point of view, though I will require to recur to it again.

As already pointed out in a quotation which I made from Lord Fraser's work ("Master and Servant," p. 93), the servant, in entering into the contract of service, is to be considered as contemplating and taking the chance of all ordinary risks properly incident to the particular kind of employment in which he engages. This rule is equally applicable in employments where the risk involved is of a slight character as in those also where the work is peculiarly hazardous.

The presumption of law is that the more hazardous the work is the higher the wages will be which are contracted to be given, and that the one is held to be the equivalent for the other, and accordingly that the workman contracts to take the risk, whatever it may be, on account of the wages which he receives. "On the other hand," says Lord Fraser, "if the servant has just as good opportunity of making himself aware of the danger as the master has, or if he be clearly aware of the danger, and continues notwithstanding to work without remonstrance, or if he exposes himself to greater risks than is absolutely necessary for the proper performance of his work, or if he is acting contrary to orders, or even out of the proper line of em-

ployment at the time the accident happens, in these and similar cases he may lose his right of recourse which he otherwise would have against the master."

I am inclined to think that in some recent Scotch cases the theory of the master's responsibility has been carried farther in cases where the system is said to have been defective and a workman has been injured thereby than it has in England. I refer to cases where there are tangible grounds for the contention that, although the system was defective, the workman knew of the danger, and worked on, accepting the risk. "It is competent," say Messrs. Roberts and Wallace, "to an employer—at least so far as civil consequences are concerned—to invite persons to work for him under circumstances of danger, caused or aggravated by want of due precautions on his part (per Lord-Justice Mellish in *Woodley v. Met. Dist. R. Co.*, 46 L. J., Ex. 521), and though it may not be humane so to carry on his works as to expose his workmen to peril of their lives, no right of action arises for an injury which is thereby occasioned when the workman has been informed of all the facts, or is acquainted with the existence of the danger, and voluntarily incurs it (*Dynan v. Leach*, 26 L. J., Ex. 221). In such a case the injury may be said to be caused, not by the employers permitting the danger to exist, but by the workman putting himself in contact with it (*Bramwell L.J.* in *Lax v. Mayor of Darlington*, 5 Ex. D., p. 35). Under these circumstances the workman has contracted to run the extra risk."

English case-law indeed is so strict as to the necessity of the workman being in ignorance of the danger that in the recent case of *Griffiths v. London St. Cath.*

Docks Company (13 Q.B.D., 259) the Court of Appeal, consisting of Lord Esher, Master of the Rolls, and Lords-Justices Bowen and Fry, unanimously affirmed the decision of Mr. Justice Day and Mr. Justice Smith, holding that an action must be dismissed where a pursuer complaining of injury failed to set forth in his pleading that he was ignorant of the danger by which the accident in question came about.

In that case it was averred that the master knew of a defect in an iron door in the premises, and that it was altogether owing to his negligence that the same was not put into a secure condition, the accident having happened through the defect referred to, but no reference was made as to the servant's ignorance of the defect. As matter of pleading, I cannot imagine such a rule can have any possible application to Scotland. I believe the defence that the pursuer is barred from recovering damages on account of the injury of which he complains having been received while working in the face of a known danger, or that the accident happened through a risk which was incident to the employment, is one which must be put upon record as a plea by the defender, just in the same way as the plea of contributory carelessness or any other plea in defence. It humbly appears to me that if it is right in the one case that the pursuer by his pleadings should undertake the *onus* of proving that he was ignorant of the danger, he should equally do so with reference to a statement that he was in no way guilty of material contributory carelessness.

The point referred to was never, so far as I am aware, mooted in the Scotch Courts until after the decision in the English case referred to. Up to that

time there never was a suggestion that the plea which I am dealing with required to be excluded by the statements in the condescendence, but it was universally assumed that it was a plea which must be put upon record by the defenders on averments on point of fact sufficient to justify the plea.

In the case, however, of *M'Leod v. Caledonian Railway Company*, October 31, 1885 (23 S.L.R., 68), the point was referred to, the case being one which went up on appeal from myself. In this action, which was directed against the Caledonian Railway Company by the father of a man who had been killed in the employment of the railway company, the defenders founded on the English case referred to. I declined to recognize the English rule of pleading, but held on the statements on record that the deceased had been working in the face of a known danger, and had accepted the risk, and accordingly that the claim was barred. Sheriff Clark altered that decision and allowed a proof, whereupon an appeal was taken to the Court of Session. The case came up before the Second Division, and an issue was objected to on the authority of the English case referred to. An issue was, however, approved of for jury trial, but the case was, I understand, extra-judicially settled.

That case was laid both at common law and under the Employers' Liability Act, and, as I have already said, there is a certain provision in the Employers' Liability Act which to a certain extent does, I think, affect the ordinary rule of common law as to the plea of known danger. No case, however, could more forcibly than Griffiths's case illustrate the proposition that English law is to the effect that where a work-

man continues to work on in the face of a known risk or danger, whatever that risk or danger be, the workman is held to accept the risk as one incident to the employment, and all claim for injury arising out of such risk or danger is barred.

I do not think Scotch law can be said to rest on such a distinct footing. It seems to me, with reference to the plea of known danger or risk incident to the employment, that the opinions delivered by the judges in certain recent cases in the First and Second Divisions respectively are hardly consistent. In the First Division in the year 1883 there were two important cases where the point under consideration was matter of judgment. The first of these was *M'Gee v. Eglinton Iron Company* (June 9, 1883, 10 R., 955). In that case Lord Kinnear had approved of an issue for jury trial, but the First Division (Lord Deas dissenting) held that the averments of the pursuer showed that he was in the knowledge that he was incurring danger through using certain insufficient pieces of wood to act as brakes in controlling the speed of waggons down a certain incline, through which defective "sprags" the accident had occurred, and dismissed the action. This the Court did in spite of the averment that he had made complaints to the foreman as to the want of proper "sprags." After pointing out that the pursuer was well accustomed to the work which he was doing, and as to what proper "sprags" should be, and that those provided were not proper, the Lord-President said:—"That was the condition of affairs for some time previous to May, 1882. The pursuer then took the very proper course of intimating to the foreman, Duffy, that there were no



proper 'sprags,' and asked him to order some, which he understood was done. They did not come, however. Then Duffy left, and the pursuer applied to his successor, Kelly, who promised to get him some, but said that at that time there was no wood at the pit suitable for the purpose. In these circumstances it is, I think, vain for the pursuer to say that he was not aware of the danger he incurred in working with the imperfect and insufficient implements. Yet he did go on working with them, and it was in consequence of that that the accident occurred in the way described by him. . . . I am therefore for dismissing this action as irrelevant." The Lord-President and Lords Mure and Shand said that the case was indistinguishable in principle from the older cases of *Crichton v. Keir* (February 14, 1863, 1 Macp., 407), and *M'Neill v. Wallace & Co.* (July 7, 1853, 15 D., 818).

In the same month, by the same Division, the case of *Wilson v. Wishaw Coal Company* (June 21, 1883, 10 R., 1021) was decided. In that case a miner claimed damages for injuries sustained through a train of empty hutches which came down the main road along a self-acting plane having caught him up as he was returning from his working face to the bottom of the shaft and severely injured him. Among Sheriff Birnie's findings in fact were these:—"That in either side of the incline there were man-holes within 20 yards of each other, but that on the left side, where the pursuer was injured, there was no man-hole for a distance exceeding 20 yards; that the incline was the only passage by which the pursuer and certain of the other miners could proceed to or return from their work; that there was a brakesman at the top of the

incline, who generally told the miners when a train was ready to start; but that there were no rules directing how the miners were allowed to go up and down the incline, and no signals to tell when the incline was clear for miners or not." There was no doubt, therefore, that the system of working was a dangerous and defective one, yet defenders were assoilzied.

Lord Shand said:—"The very fact of there being such a danger in the use of the incline is a circumstance which weighs very strongly with me in considering the question whether there was contributory negligence on the part of the workman. It appears that he was aware before starting that there was a loaded train ready to be sent off. He further knew that he would take some minutes before he would get to the bottom, and that the hutches might be despatched at any time, and that he would run a great risk of their overtaking him if he started. . . . He knowingly incurred a great risk, and cannot, I think, throw the consequences on his employers."

Now, taking these two cases together, let them be compared with the judgments of the Second Division in the cases of *Grant v. Drysdale* (July 12, 1883, 10 R., 1129) just a month later than the last case referred to, and *Murdoch v. M'Kinnon* (March 7, 1885, 12 R., 810). In *Grant's* case the action was brought by a workman who had been injured by a charge of gunpowder, which he was putting into a hole in a quarry for the purpose of blasting, going off in consequence of a cinder falling from the furnace of a steam crane used in a higher part of the quarry. The claim was advanced on the ground that the cinder had fallen owing to the furnace being defective. It

was proved that there was no plate below the furnace of the fire, and that cinders frequently fell into the quarry. The rubric bears that the Court "repelled the plea of contributory negligence, in the circumstances of the case holding that the danger was not sufficiently visible and avoidable to infer want of ordinary care in incurring it, and found the master liable in damages."

Lord Young, who gave the leading opinion, after pointing out that the system of the quarrymaster did not reasonably provide for the safety of the workmen, as the falling of hot cinders was a thing which was dangerous and was easily preventable, proceeded as follows:—"But it is contended pursuer, knowing of the faulty and dangerous arrangement, *as I assume he did, and choosing to work under it, is barred from complaining of it, and so is precluded from recovering compensation for the injuries he sustained in consequence of it.* I cannot assent to this contention, which is, indeed, very comprehensive. It is true that a man who *voluntarily—i.e., unnecessarily—*encounters a seen danger, which by ordinary care and attention to his own safety he might have avoided, shall not recover. This is the typical case of *contributory negligence*. But this rule is only applicable when the danger was visible and avoidable, so that a man with ordinary care for his own safety would avoid it, and be chargeable with want of ordinary care if he did not. It would, for example, have applied here had it appeared pursuer proceeded to charge his mine with powder under a descending shower of hot cinders, for to proceed with such work at such a time would have been inexcusable rashness on his part. But to say that he

knew he was exposed to the possibility of such an irruption is another matter ; and I cannot listen to the defender, who, as a master quarryman, defends his own conduct—that is, the arrangements which he sanctioned, and, indeed, ordered—as being consistent with the reasonable safety of his workmen, when he accuses the pursuer of inexcusable rashness or want of ordinary care of his own safety for working under them.”

The italics are mine. It is to be observed in the above quotation that Lord Young makes two assumptions the soundness of which is open to argument, viz., first, that voluntarily exposing oneself to danger means unnecessarily exposing oneself to danger ; and, second, that the plea of contributory negligence covers the plea of working in the face of a known danger. The argument, of course, is as to the first of these points that *voluntarily* means *without compulsion*, and that the question is in no way affected by the danger being one which necessarily fell to be run if the work was pursued. If the work was pursued without compulsion in the knowledge of danger it was voluntarily pursued. The quotation which I last made from Messrs. Roberts and Wallace’s work shows that their views cannot be reconciled with Lord Young’s definition.

As to the second point, I apprehend the argument would be that the plea of contributory negligence and the plea of working in face of a known danger are wholly distinct and separate pleas. The theory on which the first of those pleas is based has already been discussed and illustrated at some length, but I may briefly again point out the theory, which simply is—  
“ You cannot recover damages for an injury which has

been brought about wholly, or at least materially, through your own carelessness or rashness or other fault." But the principle on which the other plea is founded is, I take it, this—" You have made a contract with the master to work for so much ; the work is risky and dangerous, and you are aware of those risks and dangers ; you receive wages which are supposed to be a *quid pro quo* for the risk so taken, and in these circumstances if one of the known possibilities of danger culminates in personal injury the implied contract between us is that you shall have no claim against me because *you accepted the risk as one incident to the employment.*" (See as to distinction drawn between contributory carelessness and accepting risk as one incident to employment, the observations of A. L. Smith, J., in *Weblin v. Ballard*, 17 Q.B.D., 122.)

The other Second Division case of *Murdoch v. M'Kinnon* (12 R., 810) has already been referred to in connection with masters' liability for defective system. It is again to be referred to in connection with the master's plea that the workman was working in the face of a known danger. This action was raised under the Employers' Liability Act, and, as has already been pointed out, the plea of known danger may to a certain extent be affected by one of the provisions of that Act, which point will require to be dealt with later on ; but this distinction does not seem to have been founded on, and the judgment proceeded wholly upon principles of common law. In this case an accident happened to a miner, as the Court held, in consequence of there not being a bottomer or a bell for signals. The husband of pursuer, it appeared, came by his death in consequence of the brakesman mistaking an exclamation by



one of the miners for a signal. Now, it was argued in this case that the risk in connection with these matters was not great, but what risk there was was in the full knowledge of the deceased, and he went on working, and therefore must be held to have accepted the risk, notwithstanding which, the Court—consisting of Lords Young, Craighill, and Rutherford-Clark, the Lord-Justice-Clerk being absent—unanimously held that there was liability, and Lord Young, who gave the leading opinion, did not seem to think it necessary even to refer to the plea I am dealing with.

What, then, is the result of a consideration of these cases? It seems to me that *Grant v. Drysdale* and *Murdoch v. M'Kinnon* would have been decided otherwise in the First Division; and that the cases of *M'Gee v. Eglinton Iron Company* and *Wilson v. Wishaw Coal Company* would have been decided to the opposite effect had they come up in the Second Division. Numerous cases of an analogous kind must come up from time to time in the different Sheriff Courts throughout the country, and this conflict places Sheriffs in a very considerable difficulty. They know if they decide the case in a particular way the First Division will alter it if the case comes before them, and if they decide it in the other way the Second Division will reverse, should the question come before the judges of that Court. What, however, seems the plain duty of sheriffs is to decide in accordance with what appears to be the weight of authority, and as the two Divisions of the Court of Session are of equal authority, reference should be made to what appears to be the English case law on the subject. As has been pointed out, English authority is with the

First Division,\* and therefore the weight of authority must be held to be to the effect that a workman is barred from recovering damages for personal injury if, in the knowledge of the risk which he was running, through which known danger the accident complained of came about, he worked on under an improper system or with defective implements or machinery. That I take to be a correct statement of the general principle of law. It is based upon the Latin maxim, *Volenti non fit injuria* (literally *to the willing there is no wrong*, but in this connection *to the workman accepting the risk there is no wrong*).

Lord Young, it has been pointed out, construed *voluntarily* exposing oneself to danger as *unnecessarily* exposing oneself to danger. I have shown that the English view was antagonistic to such a definition, and I submitted that the proper exposition of the word *voluntarily* was *without compulsion*, and if this definition be accepted, I think it will go a considerable way to explain apparent exceptions to the general proposition of law stated above.

Thus, in the recent case of *Hutchison v. Rothwell*, which went up on appeal from the Sheriff Court of Lanarkshire to the First Division (21st January, 1886, 13 R., 463), a seaman sued the owners of a vessel for personal injury. The pursuer, on 26th January, 1884, was a seaman on board the "Neptune," which was on a voyage from Rouen to Glasgow. While steering the ship in a rough sea he was lifted by the wheel and lost his footing on a narrow platform, whereby his

\* From the point of view of equity I willingly admit there is a great deal to recommend the position taken up by the Second Division, and I think it would be well that the law should be that which the Second Division have laid down.

hand was caught in the steering gear and so severely injured that the thumb and forefinger had to be amputated. In the Sheriff Court it was held that the accident was due to the want of one of the spokes, so that the man steering lost his grip of the wheel in a rough sea, and liability was held established, damages being awarded to the extent of £50. The Judges of the First Division unanimously adhered. The Lord-President said:—"I have, for these reasons, no doubt that there was a broken spoke in the wheel before the voyage commenced, and that this was the chief, if not the only cause of the accident which happened to the pursuer. The attempt of the defenders to escape from liability upon the ground that the pursuer rushed into a known danger cannot be listened to in a case of this description. It is quite true that where a workman, seeing a danger before him, knowingly rushes into it, he has himself to blame if he sustains injury from it; the alternative being that he must decline to go on with the work. But the case of a seaman on board a vessel is very different from that of the ordinary workman upon land. It is quite impossible to suggest that because a seaman sees something wrong with the gearing of the vessel, or with some of the appliances, he is therefore to strike work. The discipline of a ship is quite inconsistent with such a position, and I should suppose that if any man in the condition of a seaman on board a ship of the mercantile marine were to take that course, he would, in the first place, be put in irons by the master, and would probably be sent to prison when he came on shore." The theory, therefore, it is to be observed, upon which this judgment proceeds was that the motto *volenti non fit injuria* did

not apply, because the seaman had no option but to take the risk, whatever it was, and that therefore in such a case as that presented the pursuer could not be held to have accepted the risk voluntarily.

There is another class of cases in which there has been a recognition of what may be argued to be an exception to the general rule, and that is where a servant has been induced by the master to continue a dangerous work on a promise on the part of the master that the danger complained of would be remedied. The theory, I take it, which has been given effect to in cases where this possible exception has been entertained rests upon the doctrine that the servant cannot be held to have accepted the risk. The question being one dependent upon contract, when the man has pointed out the danger and the master has promised to remedy it, the presumption, it may be argued, is that the master took what risk there was upon himself, to the effect at least of being responsible to recompense for personal injury sustained by the workman through such risk, in cases, at all events, where the defect complained of arises from temporary causes.

The case most frequently referred to in connection with the point under discussion is the well-known one of *Holmes v. Clarke* (7th February, 1862; 31 L.J., Ex. 356). In that case an accident happened to the plaintiff through some unfenced machinery. When the plaintiff entered the service the machinery was fenced, but a year before the accident happened, or thereabouts, the fencing was broken. The plaintiff called the defendant's attention to the matter, who examined the machinery, and undertook to have it

repaired ; but an injury having been sustained through the unfenced machinery by the plaintiff, he was met with the defence that he was working in the face of a known danger.

Lord Chief-Justice Cockburn said:—"No doubt when a servant enters an employment from its nature necessarily hazardous he accepts the service subject to the risks incidental to it ; or if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters the service, the master cannot be held liable for injury within the scope of the danger. The rule I am laying down goes only to this, that the danger contemplated in entering into the contract shall not be aggravated by an omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept. . . . It was strongly urged upon us that as the plaintiff, having become aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service, with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is therefore in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that there is a sound distinction between the case of a servant who knowingly enters into a contract to work at defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to his



knowledge, to continue to perform the service under a promise that the defect shall be remedied." The plea in defence was accordingly repelled.

A decision much to the same effect was pronounced in the case of *Holmes v. Worthington* (2 F. and F., 533), in the same year as the decision in *Holmes v. Clarke*. In giving judgment in that case the late Justice Willes said:—"There is no case decided that when the employer and servant are both aware that the machinery is in an unsafe state, and the servant goes on using it under the reasonable belief that it will be put right, and he suffers injury, that he cannot maintain an action. The master may be chary of repairs for the sake of economy, and no doubt if the servant, knowing this, chooses to remain, he may lose his remedy, but there may be a case in which he relies on repairs being done."

The result of these two cases and the opinions of the judges go, I think, to show that in England the question is not so much whether the servant knew of the danger as whether he acquiesced in the risk. In the first case referred to, it was an element in the determination of the question that the machinery was fenced when the man first went to the employment, as it was also an element that the man complaining of the temporary defect was promised personally by the master that it should be remedied.

While, however, English case law is more clear and distinct than Scotch case law with regard to the general proposition that a plaintiff cannot recover who has worked on in the face of a known danger if the circumstances infer that the risk has been accepted, whether the apparent exception recognized in *Holmes*

*v. Clark and Holmes v. Worthington* would be homologated by the First Division of the Court of Session seems at least doubtful, though no doubt, *a fortiori*, from the principle given effect to in *Grant v. Drysdale*, and from what was said in the later case of *Baird v. M'Monagle* (9 R., 364), the Second Division would not entertain the defence. Indeed, the authority of *Holmes v. Clarke* seems to have been disregarded or repudiated in the First Division case *Crichton v. Keir*, incidentally referred to above (14th February, 1863, 1 Macp., 407).

No doubt a distinction was attempted to be drawn by some of the judges between that case and the case of *Holmes v. Clarke* on the ground that the obligation to fence was a statutory obligation (as to which point I will refer shortly); but the then Lord Justice-Clerk (Inglis) based his decision on the following grounds:—“If a servant, in the face of a danger, chooses to go on with his work, he does so at his own risk. The averments of the pursuer are such, if true, as would have entitled him to refuse to continue working, and I cannot in such circumstances allow the servant to say to his master, ‘I went on at your risk.’” In this case it is to be observed that the pursuer averred that the horse through which injury resulted was unfit for the work; that the defenders were aware of its unfitness, and induced him to continue working under a promise to provide another horse.

It is well to note in the cases of *Holmes v. Clarke*, *Holmes v. Worthington*, and *Crichton v. Keir*, that the promise founded on as being an element in non-acquiescence of risk was said to have been made by the master, but at common law, if the promise were

given by a foreman, and if it was part of his duty to see to the remedy, his fault could not be founded on by a pursuer complaining of personal injury, such fault being that of a *collaborateur*. (See the English cases of *Gallagher v. Piper*, 33 L.J.C.P., 329, and *Hall v. Johnson*, 34 L.J., Ex. 222.) Actions founded upon the Employers' Liability Act, as will be seen later on, stand in a different position.

There is still another class of cases in which there is room for an exception to the general proposition of law I am dealing with—viz., where actions are based on the neglect of statutory precautions imposed for the protection of the public.

In England the law appears to be in not such a clear state as might be wished with reference to the question whether the neglect of statutory precautions can infer any ground of action on which an action at common law can be based. In statutes generally, where obligations are imposed upon masters with reference to the protection of servants, specific means of enforcing the duties which the statutes create are provided by the statutes themselves. Thus, under the Factory Act for the failure to fence dangerous machinery certain penalties may be claimed by the Government Inspectors.

In Messrs. Roberts' and Wallace's book, p. 27, these writers say:—"Allusion has already been made to the fact that in some businesses the Legislature has pointed out certain specific precautions, and imposed a corresponding duty upon the employer to adopt them. Many of such precautions are prescribed for the benefit of persons engaged in the employer's business, and these will be more particularly referred to hereafter; but with

reference to all such statutory provisions the question arises whether the mere breach of a duty created and imposed solely by statute gives a right of action for damages to a person who has been injured thereby. This question is one of some difficulty, and would seem even at the present time not to be definitely settled." Conflicting English authorities are given with reference to the general proposition, to which I need not refer here.

I take it, however, to be tolerably clear both in England and Scotland that wherever the statute is a public one, and designed for the protection of a certain class of the community, that any member of that class can found upon the statutory breach of duty on the part of those on whom it is imposed, whereby injury has resulted, as affording a valid claim for damage at common law, the theory being that where certain precautions for public safety are found so advisable by the Legislature as to call for legislative enactment, they must be held to be reasonable precautions, and a failure to take reasonable precautions gives a basis for the averment of *culpa* at common law.

This view seems to be countenanced by Earl Cairns' judgment in the case of *Atkinson v. Newcastle, etc., Water Works Company* (L.R., 6 Ex., 404). In that case, he said:—"The question of whether a person who can show that he has sustained injuries from the non-performance of a statutory duty can bring an action for damages against the person on whom the duty is imposed must to a great extent depend on the purview of the Legislature in the particular statute and the language which they have there employed, and more especially when the Act with which the Court had to

deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner which they will keep up certain public works."

In the case referred to the Court held that the general scheme of the statute under consideration was not to create any duty breach of which might furnish subject of an action at the suit of an individual. The only question with which we have any interest is as to statutory precautions taken for the safety of workmen. In England it may be that the quotation from Lord Chief-Justice Cockburn's opinion given above in the case of *Holmes v. Clark* would seem to show that there would still be a valid defence to an action of damages brought on the ground that the master had been guilty of *culpa* in respect of not complying with the statutory precaution as to fencing, on the theory that the man accepted the risk, provided he accepted employment knowing the machinery was unfenced.

In Scotland it appears to be at least doubtful whether this defence would be given effect to. With us, where statutory precautions imposed upon the master with the object of protecting workmen against themselves are infringed, and injury has in consequence resulted, the defences of contributory carelessness, of risk incident to the employment, or of working in face of a known danger, will not, I think, be entertained as of the same validity in cases where the ground of action is based on the plain neglect of such statutory precautions, as in the ordinary run of action of damages for personal injury.

Thus, in the case of *Edgar v. Law and Brand* (December 15, 1871, 10 Macp., 236), in an action of



damages brought on account of the death of a collier by his widow, it was held on a proof that the coal-master had failed to provide the protection required by the regulations (being the special rules approved and promulgated for the regulation and guidance of the workmen in terms of 18 and 19 Vict., cap. 108, and having statutory force); that in respect of the failure the defenders were guilty of neglect of duty, and that the death was due to the neglect complained of, and that there was liability. The failure complained of was neglecting to provide a bottomer. In that case, unquestionably, the knowledge that a bottomer was not being used was equally well known to the deceased as to the employers.

Lord Kinloch, in giving his opinion, pointed out what the duties of the bottomer were, and then he proceeded:—"He (the bottomer) was specially in regard to these matters to instruct all the workmen, themselves presumably ignorant or thoughtless. The presence and services of the bottomer were thus indispensable to the safe working of the pit. His absence was proportionally attended with danger to the workmen."

In the more recent case of *Murdoch v. M'Kinnon* (12 R., 810), previously referred to, liability was held established on account of the want of a bottomer, but the judgment, as was pointed out, proceeded on theories of common law alone.

In the case of *Gibb v. Crombie* (July 6, 1875, 2 R., 886), a lad between 17 and 18 years of age, employed at night work in a factory, was injured by the belt of a teasing machine at which he was working slipping off the drum and catching his arm. The belt and lower pulley were not fenced. In connection with

the point with which I am dealing, Lord Ormidale, who gave the leading opinion, said :—" Although I assume that any person, young or old, provided that he is of sufficient intelligence to know what he is about, who wantonly and willingly thrusts his arm into machinery is not entitled to damages, there is no evidence whatever in the present case that the pursuer so acted. Such a defence would require to be well supported by the facts before it could be entertained against the plain policy of the Factory Acts, which were intended to afford a protection to young persons against the carelessness and inexperience incidental to their age. In other words, the object of these Acts is to protect children and young persons against themselves." Lord Neaves also said—" The object of these Factory Acts is to protect young persons against themselves." The Judges unanimously held there was liability on the part of the master.

These cases, I think, fairly show that the neglect of statutory precautions whereby injury has resulted, and which statutory precautions were devised for the protection of persons against themselves, will very seriously affect the defences of risk incident to the employment, and of working in the face of a known danger, if preferred by a master in an action by a servant injured by the neglect of such statutory precautions. I am inclined, however, to believe that Scotch cases have gone further in this direction than English Courts have assented to.\*

NOTE.—Although not within the scope of this

\* See also *Woods v. Caledonian Railway* (July 9, 1886, 13 R., 1118). In this case the alleged contributory negligence was that of one of the public, but the principle is practically the same.

Part, it is certainly desirable in connection with my subject to refer to the question of whether the injured workman has any action against a fellow-workman through whose fault the accident has come about, and perhaps this will be the most convenient point to deal with the matter. There is no doubt whatever as to the law of Scotland. The Latin maxim *culpa tenet suos auctores* has always been held to rule that the actual wrong-doer is answerable. Wright *v.* Roxburgh and Morris (Feb. 26, 1864, 2 Macp., 748) was an action raised, not only against the coal-master, by the widow of a collier in his employment, and who had been killed in such employment, but also against the underground manager. In that case the coalmaster was freed from liability on the ground that the accident had happened through the fault of the other defender, the underground manager, and that the latter, being the fellow-servant of the deceased, there was no liability on the master's part; while, at the same time, the underground manager was held personally liable in damages. It never seems to have been suggested in the case that the underground manager was not personally liable if the accident was held due to his fault. Reference may also be made to the later case of Stewart *v.* Coltness Iron Company and Dewar (4 R., 592), where the same assumption in point of law is made, although in this latter case the alleged negligence or fault on the part of Dewar, the manager of the mine, was held not to be established.

In England some doubt has been thrown upon the question of the liability of a fellow-servant wrong-doer in consequence of a dictum said to have fallen from

Chief-Baron Pollock in the case of *Southcote v. Stanley* (1 H. and N., 247). The theory for non-liability appears to proceed upon the assumption that the injured man in a question with his fellow-workman had impliedly undertaken to run the risk of being injured through the fault of any of his fellow-workmen. Messrs. Roberts and Wallace (p. 115) controvert this theory, and give later authorities in support of their views, which are that the law of Scotland is right, and that the law of England is really the same as that of the former. In America, the law seems to be the same as that of Scotland; and although at one time there was a contrary decision in Massachusetts, this judgment appears to have been overruled by a later case in the same State.

## PART III.

I now come to the third head of subject set forth at the outset, viz. :—

III. *The liability of employers to their workmen under statute—that is, by Acts of Parliament such as the Employers' Liability Act of 1880, and the Factory and Workshop Act.*

We have seen that, under the law of Scotland at all events, a good ground of action at common \* law lies against a master where statutory precautions for the protection of servants have been neglected by him, and injury has been occasioned by such neglect. It has also been shown that, where such precautions were devised on the face of the statute itself to protect the workman against his own imprudence or rashness, this fact would have a very material effect upon the validity of the defences of contributory negligence, risks incident to the employment, and working in the face of a known danger.

Probably the most important Acts apart from the Employers' Liability Act of 1880 devised for the protection of workmen are the Factory and Workshop Acts and the Coal Mines and Metalliferous Mines Acts. I had intended to have set forth in some detail the most important provisions of protection in public

\* See page 111.



statutes, failure to observe which, and through which personal injury or death might result, and which might have furnished the basis for an action for damages at common law. But the principal grounds of such actions have already incidentally been pointed out—viz., failure to fence, under the Factory Acts, and failure to provide proper systems of ventilation, or such workmen as the Mines Regulation Act has pointed out as essential to safety; and I think it sufficient to say here generally that wherever there are provisions in public statutes for the protection of workmen or workpeople, and there has been failure to observe these statutory precautions, with the result of loss of life or injury to person, by Scotch law at all events, there would appear to be a good ground of action at common law.

I therefore propose at once to come to the consideration of the scope and effect of the Employers' Liability Act, but in order properly to present this subject to my readers, I think it may be desirable to refer briefly to the history of the measure before it actually became law; I then propose to set forth generally what the Act was intended to do, and what it has actually done; and, in the third place, I intend to investigate in some detail the principal provisions of the statute, and the more important decisions which have been pronounced in the Courts of England and Scotland with reference to different points raised under the statute.

It may be remembered that it was previously pointed out that a Select Committee had been appointed on 22nd June, 1876, on the motion of Mr. Macdonald, to consider certain questions with regard to the master's responsibility for injuries to servants

in view of certain suggested alterations of the law. The Committee appointed consisted of seventeen members, viz.:—The Attorney-General (Sir John Holker), Sir Henry Jackson, Sir Daniel Gooch, and Messrs. Lowe, Wyndham, Walter Stanhope, Shaw-Lefevre, Macdonald, Tennant, Mundella, Knowles, Eustace Smith, Gibson, Meldon, Lawley, Hopwood, and Bulwer. Mr. Lowe, now Lord Sherbrooke, was appointed chairman. One of the proposals specially mooted was the abolition of the defence of *collaborateur* or common employment. It seems desirable to quote the 9th, 10th, 11th, 12th, and 13th paragraphs, being the concluding paragraphs of the report which was presented to the House of Commons:—

“ 9. There can be no doubt that the effect of abolishing the defence of common employment (as has been actually proposed in a bill submitted to the House) would effect a serious disturbance in the industrial arrangements of the country. Sooner or later the position of master and workmen would find its level by a readjustment of the rate of wages, but in the meantime great alarm would be occasioned, and the investment of capital in industrial undertakings would be discouraged. Your Committee cannot express their opinion on the question of the public policy involved in the existing law better than by adopting the language of the distinguished American judge who decided the case of *Farwell v. the Boston and Worcester Railway Corporation*. ‘When several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much upon the care and skill with which each other shall perform his appropriate duty, each is an overseer of the conduct

of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for an indemnity in the case of loss of life by the negligence of each other.'

"10. Your Committee, therefore, are of opinion that no case is made out for any alteration in the law relating to the liability of employers to their workmen for injury in the course of their employment, except in the matter to which they now proceed to refer.

"11. A master is not altogether free from liability to his servant for injuries resulting in the course of his employment. If it can be shown that the master has omitted to provide the servant with proper materials and resources for the work (such as engines or scaffolding), or has been negligent in the choice of the persons to whom he entrusts the supply of such materials or the arrangement of such works, or has been guilty of want of care in the selection of proper servants, the master is liable, even to his own servant, for any injury resulting from such omission or negligence. But to establish this liability it must be brought home to the master personally. The development of modern industry has created large numbers of employing bodies, such as corporations and public companies, to whom it is not possible to bring home such personal default; and there are other cases in which masters leave the whole conduct of their business to agents and managers, themselves

taking no personal part whatever, either in the supply of materials or in the choice of subordinate servants.

“12. Your Committee are of opinion that in cases such as these—that is, where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfil the functions of masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of their principals. The facts of such a delegation of authority would have to be established in each case, but this would not be a matter of difficulty.

“13. Your Committee are further of opinion that the doctrine of common employment has been carried too far when workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment. Such cases do not come within the limits of the policy on which the law has been justified in paragraph 9 of this report.”

It appears from the printed proceedings of the Committee that two draft reports were submitted to the Committee, one by the Chairman and one by Sir Henry Jackson, and it was agreed by 8 to 4 that Sir Henry Jackson's report should be taken up as the basis for consideration, paragraph by paragraph. Mr. Lowe's draft had the approval of Mr. Macdonald. The follow-

ing paragraph from Mr. Lowe's draft report will be read with interest:—

“In a small industrial establishment, managed by its proprietor, it seems that the master, a person presumably able to meet all such demands upon him, would be liable, as the law now stands, for all injuries which arose from his negligence—that is, in the case supposed, for all defects of management by which injury is inflicted on his workmen. Such an undertaking occupies a middle position between the case of the master of menial servants, who is liable for all negligence of his servants, and the case of the owners of large industrial undertakings, who are practically liable for none. Such an industrial arrangement, removed as to liability from either extreme, seems to the Committee a type of the conditions under which the interests of masters and men are fairly consulted. The workman has, as the Committee think he ought to have, the right to compensation for any injury which he may suffer from the negligence of those whose orders he must obey, and the master is not liable for injuries which his workmen may commit upon each other. Taking this as a type of what appears to them to be a just and fair arrangement, the Committee observe with regret that it seldom exists, and that the law as it stands offers a premium on its discontinuance. By declaring that managers are fellow-servants with the labouring men in a mine, a factory, or a workshop, the law has offered a premium on the delegation of all power from the master to his subordinates, since he is relieved by such a delegation from the liability which he had while he managed his own affairs. But to whom is that liability trans-



ferred? To inferior agents who are liable, but whom, by reason of their position in life, it is not worth while to sue. Thus by a change effected entirely for the benefit and convenience of the owner, the workman is deprived of an indemnity which the law gives him, because the law never contemplated the vast industrial undertakings which now exist, and the Courts of law, by an imaginary contract, have restricted the claim for compensation to fellow-servants who are unable to pay. This seems to be a case for the application of the maxim '*Sic utere tuo alienum ne laedas*'; if the master for his own convenience withdraws himself from the management of his own business, the workman ought not to suffer by the loss of a defendant whose position is a guarantee that he is able to satisfy their just demands, and by the substitution of one who is not, any more than the creditors of the master ought to be deprived of their remedy against him because the debts were incurred by his agents.

"The Committee therefore recommend that the funds of every industrial undertaking shall be liable to compensate any person employed in such undertaking for any injury he may receive by reason of the negligence of any person exercising authority mediately or immediately derived from the owners of such undertaking, with this qualification—that the liability to indemnify shall not extend to persons who, though exercising authority, are *bona fide* employed in actual labour, as distinguished from superintendence.

"Finally, the Committee would recommend that, whether it be determined to adopt these or any other recommendations, or to leave matters as they stand at

present, an Act of Parliament be passed stating in clear and precise terms the law as regards the liability of masters for injuries to persons employed in industrial undertakings. Your Committee have found very few of the witnesses whom they have examined, excepting professional lawyers, thoroughly acquainted with the present state of the law on this important subject. This arises probably from two causes—first, the whole matter is left to the common law, and is only to be found in reported cases and works which are a sealed letter to the great majority of the public; and, secondly, the law has been gradually developed by the ingenuity of the judges to an extent which they themselves at first hardly contemplated. The consequence has been that what were believed to be the rights of the working classes have been gradually withdrawn from them without their knowledge, and without the power of protesting, or of taking steps to defend themselves by an appeal to the Legislature.”

The Act which was the outcome of the Committee's report proceeded, I think, more on the lines of Lord Sherbrooke's report than on that actually presented to the House of Commons, although the distinctions of these reports were rather of degree than divergence of opinion. The object of the Act may be described generally as an attempt to extend in the interest of the workmen what the Lord-President in the case of *Woodhead v. Gartness Coal Company* (4 R., 469) described as “the secondary responsibility of employers of labour,” or otherwise the Act may be described as one with the object of making employers liable to a certain limited pecuniary extent for the

fault of foremen or superintendents of labour whereby injury or death has been occasioned.

We have seen by the common law that whatever the grade of the person through whose fault injury had resulted, if he was the servant of a defender who paid him as well as the injured party, the defence of common employment was available to the master in defence. Giving effect to the views set forth generally in the quotations I have given above, the Legislature by this Act removed the defence of common employment from being available to the master when an action for personal injury was brought against him by a servant in cases where injury had come about through the fault of a foreman, of a person to whose orders the injured party was bound to conform, and in consequence of his having so conformed injury had resulted, or, in certain cases, of persons entrusted with special duties requiring skill whereby injury had resulted.

Thus, in the case of *Morison v. Baird & Co.* (December 2, 1882, 10 R., 271), Lord Young said:—

“I adhere, indeed, to what I said, and what I understand your Lordship said, in the case of *M'Avoy*, which is referred to in the Lord-Ordinary's note—that, in truth, the statute does no more than remove a defence in the class of actions to which it refers, which was theretofore competent, by providing that an employer against whom such action is raised shall not, in certain circumstances specified in the statute, be entitled to plead what the common law entitled him to plead—that he is not responsible to one employé for the fault of others. The statute does no more than remove that defence in certain specified circumstances.”

In the recent English case of *Weblin v. Ballard* (March 22, 1886, 17 Q.B.D. 122), an elaborate and most valuable exposition of the effect of the Act with regard to the defences of an employer for physical injury to the employed was given by Mr. Justice A. L. Smith, concurred in by Mr. Justice Matthew. I make no apology for quoting a passage of some length. He said:—

“A point of very general application is raised in this case, viz., what defences are now open to a master when sued by a workman under the Employers’ Liability Act, 1880. To determine this it is necessary to bear in mind how the law stood prior to the passing of the Act. A servant might have sought redress from his master for personal injury subject to any defence the master might set up in the following cases: (*a*) for injuries sustained to the servant by reason of the negligence by the master himself; (*b*) for injuries sustained by reason of the negligence of a servant acting within the scope of the master’s employment; (*c*) for injuries sustained by reason of the master having negligently provided defective or dangerous implements or material. To these causes of action the master might have set up, amongst others, the following defences: traverse of the negligence and contributory negligence on the part of the plaintiff. These defences the master had irrespective of the fact of his being master and the plaintiff being his servant. The master, however, had also in addition to the above-mentioned defences two other defences arising from the relative position of servant to master, and peculiar thereto. He had the defence of what we may term, for brevity, the defence of ‘common employ-

ment.' He had also the defence that the servant had contracted to take upon himself the known risks attendant upon the employment. As to this last defence see per Lush, J., in *Brooks v. Courtney* (20 L.T., 440); and see *Griffiths v. Gideon* (3 H. and N., 648) and *Holmes v. Clarke* (7 H. and N., 937). In what way, then, does the Employers' Liability Act, 1880, affect the position of the master when sued by a workman under the provisions of that Act? By section 1 it is enacted that where personal injury is caused to a workman, the workman shall be at liberty to sue his employer for the five matters designated in that section, as qualified by the second section; and that in *such* actions the workman shall have the same rights of compensation and remedies against the employers as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work. What is the meaning of this? In our judgment it means that the workman, when he sues his master under the provisions of the Act for any of the five matters designated in it, shall be in the position of one of the public suing, and shall not be in the position a servant theretofore was when he sued his master; in other words, that the master shall have all the defences he theretofore had against any one of the public suing him, but shall not have the special defences he theretofore had when sued by his servant. What, then, is the result? It is this, that the defence of contributory negligence is still left to the employer, but the defence of common employment and also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement are taken away from him when sued by a



workman under the Act. We agree to what was said by A. L. Smith (himself) in the case of *Stewart v. Evans* (49 L.T., N.S., 138); and we agree in what the late Mr. Justice Watkin Williams, and our brother Cave, also therein said as to the defence of contributory negligence still being preserved to the master when sued by a workman under the Act. In our judgment, however, the Legislature, while stating for the employer the two defences above mentioned, has given him a statutory defence under sec. 2, sub.-sec. 3, which theretofore did not exist. It is this: the employer, when sued for a defect in the ways, plant, or machinery, may set up that the servant knew of the defect and did not communicate it to him (the employer) or to some other person superior to himself in the service of the employer. This, if proved, would avail the employer as a defence, and the only excuse which the workman would have for not communicating the known defect would be to establish that he was aware that the employer knew of it. The Legislature has thus taken from the employer two defences and given him another. This, in our judgment, is the true effect of the Employers' Liability Act, 1880. We now apply this to the case in hand." \*

Having thus shown what the Act was intended to do and what generally has been its effect, I now come to the provisions of the statute itself. The first section of the Act is as follows:—

"I. Where, after the commencement of this Act, personal injury is caused to a workman (1) by reason

\* See, however, in connection with the above exposition of the effect of the Employers' Liability Act on the masters' defences, the opinions of Wills and Grantham, J.J., in the later case of *Thomas v. Quartermaine* (17 Q.B.D., 414).

of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or (4) by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

This section is the kernel of the Act, and the different sub-sections have to be read in the light of certain exceptions to the law as amended, which are set forth in section 2, but which at this point I need not take up, as each of the different sub-sections I have quoted above will require to be dealt with separately and in detail hereafter.

Before, however, doing so, it appears to me more logical to deal with the following questions—(1) Who are entitled to the benefits of the Act; or otherwise, who are entitled to sue in virtue of its provisions? (2) What antecedent steps are necessary to an action laid on the statute? (3) Can an action at common law be combined with one founded on the provisions of the statute? (4) The proper *forum* for bringing an action under the Act? And (5) the limit of compensation allowed under the Act.

(1) *Who are entitled to the benefits of the Act; or otherwise, who are entitled to sue in virtue of its provisions?*

It is, I have no doubt, Scotch law that all servants, whether within the definition of “workmen” in the sense of the statute or not, are in no way barred by the Employers’ Liability Act from suing an action at common law and bringing it before any Court where previously it could have been competently brought.

In England there seems to be some doubt upon the subject in consequence of a dictum in the case of *Munday v. Thames Ironworks Company* (10 Q.B.D., 59); but Messrs. Roberts and Wallace say (p. 207)—“Moreover all servants, whether within that definition or not (workmen under the Act), are still entitled to maintain an action against their employer in the High Court, as well as the inferior Courts, in all cases where they could formerly have done so. To this opinion the authors still adhere, though there is a dictum to the contrary effect in *Munday v. Thames Iron Company*. For, according to the language of the Courts in every age, it is not to be presumed that the Legislature in-

tended to make any innovation upon the common law further than the case absolutely requires; and in order to take away a legal right, it is necessary to show express words in the Act or clear implication. It is certain that there are no such express words in the Act, and it is submitted with confidence that there is no such implication."

From the quotation that I made *supra* from Lord Young in the case of *Baird v. Morrison*, it would appear that all the Act can be held to have done has been in certain specified circumstances to remove pleas in defence.\* This, of course, by implication means that no right possessed at common law previous to the passing of the Act is in any way affected, and there are dicta in other cases in which it is assumed that no common law right is in any way touched by the provisions of the Act, *M'Avoy v. Young's Paraffin Co.* (Nov. 5, 1881, 9 R. 100); *Dailly v. Beattie* (July 8, 1882, 20 S.L.R., 92).

While, however, all servants having a good ground of action at common law before Courts where such action previous to the statute could have been raised are not in any way barred from such action by the provisions of the statute, only certain descriptions of servants are able to found on the provisions of the Employers' Liability Act.

By the eighth section of the Act employer includes "a body of persons, corporate or incorporate," and the term employer may be defined to be that person, or body of persons, with whom a "workman" has con-

\* To the same effect generally is Mr. Justice Smith's opinion in *Weblin v. Ballard* (17 Q.B.D., 122), although pointing out that in one very special case the Act may furnish a new plea in defence to the employer.

tracted to serve. Who then is a "workman," in the sense of the Act, and as such entitled to sue for damages?

By section 8 "workman" is defined to mean "a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." The term "railway servant" must be taken as including all officials in the service of railway companies, whatever their grade, and not only those whose duties are wholly or principally connected with manual labour. "Any person to whom the Employers and Workmen Act, 1875, applies" requires greater explanation.

I may remark in passing that it is in the general case extremely inadvisable not to repeat in an Act itself necessary words of definition. The provision quoted makes a reference to another Act of Parliament the only way of discovering what the Employers' Liability Act has made law. We have accordingly to refer to the definition of "workman" in the Act of 1875 (38 and 39 Vict. c. 90).

By section 10 of that Act it is provided "the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Under the provisions of the general statute 13 and



14 Vict., c. 21, section 4, "words importing the masculine gender shall be deemed and taken to include females," and so the Employers' Liability Act is applicable to persons of the female as well as of the male sex.

By the twelfth section of the Employers and Workmen Act of 1875 an apprentice is not a workman in the sense of that Act when a premium of more than £25 is paid on his being bound to the employer. Seamen and their apprentices are excluded by the 13th section of the 1875 Act.

The case of *Oakes v. Monkland Iron Co.*, Feb. 21, 1884 (11 R., 579), is a somewhat important one with reference to the question of who are to be regarded as "seamen." The circumstances of that case were as follows:—A lad of the name of O'Shea entered the service of the defenders as a labourer at their ironworks when about fourteen years of age. In September, 1882, he became a fireman on board the screw-steamer belonging to the company which plied on the Forth and Clyde Canal between Glasgow and Grangemouth. The lad was drowned through a collision with another steamer on the canal, and the mother of the deceased, with the consent of her second husband, brought an action of damages against the company, on the ground that the accident had been occasioned by the fault of the company or of the master of the screw-steamer in which the lad was fireman.

The action was laid both at common law and on the Employers' Liability Act. The plea was taken that the action, as based on the Employers' Liability Act, was incompetent, in respect that the deceased was not

a workman in the sense of the Employers' Liability Act, and, giving effect to this plea, Sheriff-Substitute Erskine Murray dismissed the action so far as founded on the statute, and he was affirmed by the Sheriff-Principal. The Second Division unanimously (Lord Young being absent) held the pursuer was "a workman in the sense of the Act."

After referring to clauses 10 and 13 of the Act of 1875, the Lord-Justice Clerk proceeded:—"So stood the law prior to the passing of the Employers Liability Act, 1880, which is that under which this action proceeds. By the definition clause (8) the expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. This by itself would have left the question as it stood under the Act of 1875; but in the same session of Parliament, and prior to the Employers' Liability Act, 1880, there was passed an Act, c. 16 of that year, entitled 'Merchant Seamen Act, 1880,' by section 11 of which it is provided—'The 13th section of the Employers and Workmen Act, 1875, shall be repealed in so far as it operates to exclude seamen and apprentices to the sea service from the said Act, and the said Act shall apply to seamen and apprentices to the sea service accordingly; but such repeal shall not in the absence of any enactment to the contrary extend to or affect any provision contained in any other Act of Parliament passed or to be passed whereby workmen is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies.'

"It thus appears that in 1880 the Legislature had come to be satisfied that there was no good reason for maintaining the exemption of seamen, which had been

introduced into the Employers and Workmen Act, 1875, and accordingly all the provisions of the Merchant Shipping Act, 1854, must be read in conformity with the statute of 1880. It may, I think, admit of doubt how far the subsequent statute, c. 42 of 1880, is effectually qualified to any extent by the proviso in section 11 of the previous Merchant Shipping Act, 1880. Meanwhile, however, I am of opinion that a servant employed on board a vessel solely used on a canal is not a seaman. A barge or lighter or vessel of any kind used on an inland artificial waterway cannot be brought within the provisions or intendments of the Merchant Shipping Act to any effect. The mercantile marine of this country consists of a seafaring population, and the merchant navy substantially is composed of sea-going vessels only. A ship in ordinary language means a vessel which goes to sea, and a seaman means what the name imports—one whose ordinary employment is on the sea. If he goes to sea on any craft not propelled by oars he is a seaman under the Merchant Shipping Act, but not otherwise."

Commenting on this judgment, Messrs. Roberts and Wallace say:—"A fireman on board a steam canal boat has been held in Scotland to be an artificer or workman, on the ground that the navigation of an inland artificial waterway could not be brought within the Merchant Shipping Act. But the expressions in the judgment which would extend this ruling to all inland waters do not seem to be quite consistent with the phraseology of the Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104, sec. 19). In any event, however, the driver of a track-boat horse, or one em-

ployed to haul a barque along a canal or a river, who might never quit the shore from one year's end to the other, is of course a landsman and not a seaman."

The words "otherwise engaged in manual labour" occurring in the section of the Act of 1875 quoted above, have given rise to diametrically opposite decisions in the Courts of England and Scotland as to whether a tramway conductor is a person falling under this category.

The Scotch judgment, *Wilson v. Glasgow Tramway Company* (June 22, 1878, 5 R., 981), was pronounced before the passing of the 1880 Act. In that case the Lord Justice-Clerk and Lord Ormidale agreed in holding that a tramway conductor was a "workman" within the meaning of the Employers and Workmen Act, 1875. This case was originally a small-debt case, but from its general importance was certified on appeal from the Circuit Court to the Second Division. The principal point was whether the Sheriff-Substitute in giving judgment had acted incompetently or oppressively in refusing to give effect to an agreement produced. The case had no direct connection with the Employers' Liability Act, the decision being given prior to its passing, as was noted above; but, of course, if a tramway conductor falls within the definition of "workman" in the Employers and Workmen Act, 1875, he is one of the persons entitled to the privileges of the Employers' Liability Act. If he does not fall within the definition he cannot claim its benefits. Lord Gifford, who was the only other Judge present, expressed no opinion on this point.

The Lord Justice-Clerk said:—"I am of opinion, first, that the respondent was a workman in the sense

of the statute. He was not a domestic servant. He was not other than a labourer employed to attend on the tramway cars, as much as a miner employed to work a windlass or the gearing of a pit, or a man engaged to guide the horses of a track-boat on a canal. I am unable to draw any distinction which would not neutralize the Act altogether."

On the other hand, in the case of *Morgan v. The London General Omnibus Company* (December 18, 1883, 12 Q.B.D., 201), it was held by Day and Smith, J.J., that an omnibus conductor engaged at daily wages, paid daily, was not a person to whom the Employers and Workmen Act, 1875, applied, and therefore they held he was not entitled to the benefit of the Employers' Liability Act, 1880. This was an affirmance of the judgment of a County Court.

Mr. Justice Day, in giving judgment, said:—"We have been much pressed with the decision of the Court of Session in Scotland. Now, although that case is not an authority which is absolutely binding upon us, the Court of Session not being for this purpose a Court of co-ordinate jurisdiction with ourselves, far be it for me to say that the decisions of that Court are not entitled to receive the greatest consideration and respect at our hands. It has been strongly urged that it would be inconvenient if a different law were to prevail on this side of the Tweed from that which is administered on the other side. If that be so, it is an inconvenience which has subsisted for a very long time, and I do not anticipate that any very great inconvenience will result if we take a different view of the meaning of an Act of Parliament from that which the Judges who preside in the Scotch Courts do, and pos-



sibly if the learned Lords who decided *Wilson v. Glasgow Tramway and Omnibus Company* had had this case before them they would have come to the same conclusion that we have come to. The majority of the Court in that case held that an omnibus conductor was a labourer within the meaning of the Act which they were called upon to construe. It may be that there was evidence before them on the subject. I unhesitatingly come to the conclusion that this omnibus conductor is not a labourer within section 10 of the Act, 1875, and I arrive at this conclusion without any reference to the Employers' Liability Act, 1880."

This judgment was unanimously affirmed in the Court of Appeal, consisting of Lord Esher, Master of the Rolls, and Lords Justices Bowen and Fry (May 16, 1884, 13 Q.B.D., 832). It therefore appears that while the Sheriff Courts of Scotland are ruled by the decision in *Wilson's* case, the County Court judges in England must pursue a different course on the authority of *Morgan's* case.

"Domestic and menial servants" are excluded from the benefit of the Employers' Liability Act. Domestic servants in the ordinary meaning are those servants who reside in the master's house, although, as was held in the case of *Graham v. Thomson* (1 Shaw, 287, February 12, 1822), in certain circumstances even a female servant may be compelled to reside out of the house on payment of board wages. A "menial servant" has a somewhat more extended meaning than "domestic servant," although derived from *intra mœnia*, that is, within the walls of the master's house. Thus, for instance, a groom or a gardener is a menial servant,

although in the ordinary case neither actually lives within the mansion-house.

The term labourer is one which admits of discussion in certain circumstances, as will be seen from the cases of Wilson and Morgan referred to above. Messrs. Roberts and Wallace say (p. 218):—"The term labourer will not include a carpenter, a bailiff, or the clerk of a parish, nor will it apply to a person employed solely as a caretaker or watchman with no active duties; and as such a person could hardly be said to be engaged in manual labour, he cannot be considered a workman; but it seems clear that the description labourer sufficiently includes navvies, stevedores, coal-heavers, porters, and generally all persons engaged in work involving severe toil, but which as a rule requires comparatively little skill."

I think this is also a correct exposition, generally speaking, of Scotch law. I incline to believe, however, from the tendency of decisions in the Second Division that Scotch judges will interpret liberally all the different categories enumerated as falling under "workmen" in the Act of 1875, so as to bring a pursuer under the provisions of the Employers' Liability Act, unless there be direct authority against such interpretation.

Labourer, I think, is placed in juxtaposition to "journeyman." A journeyman is a man who labours with his hands, but at work requiring skilled knowledge, which knowledge is generally acquired by apprenticeship to a particular trade. It does not, however, matter how the skilled knowledge be acquired, if the workman be employed as a journeyman.

I do not know that there is any real distinction in

the phrases "artificer" and "handicraftsman" from that of journeyman, but these words may perhaps be argued to embrace a larger number of skilled workmen than those which might technically fall under the definition "journeyman."

"Servant in husbandry" is easily explainable from its own terms. It means a farm or other agricultural servant.

"Miner" means all persons employed in the underground workings known as mines. The term would not apply to a pitheadman, but the latter would be embraced, if not under any other category, in that of "otherwise engaged in manual labour." In Messrs. Roberts and Wallace's work numerous decisions bearing upon the different categories of workmen referred to will be found. Into the delicate distinctions drawn I do not think it necessary for the purpose of this work to enter. What has been said will, I think, serve generally to show the classes of persons entitled to avail themselves of the privileges of the Employers' Liability Act.

It is to be remembered that the widow and children of all workmen have as good a right to claim damages for the death of a workman, by Scotch common law, as the workman himself has if only injured. Such an action, by English common law, was, it appears, not maintainable.

This was remedied by what is known as Lord Campbell's Act, 9 and 10 Vict., cap. 93, which proceeded upon the preamble:—"Whereas no action at law is now maintainable against any person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right

and expedient that the wrongdoer in such case may be answerable in damages for the injury so caused by him." The Act then provides that where a person, whose death has been caused by such wrongful act, would have had a good ground of action if injury only resulted, an action should be maintainable by his executor for the benefit of wife, husband, parent, or child.

By a subsequent English Act, 27 and 28 Vict., cap. 95, if there is no executor or administrator the action may be brought by any of the persons for whose benefit the action would have been brought by an executor or administrator. In Scotland the action does not need to be sued in name of an executor. The wife, parent, husband, or child have a personal claim of damage for the wrongful act which has led to the death of their relation.

We have seen who are entitled to sue for compensation under the Employers' Liability Act, but railway servants and all or any of the different categories of workmen in the sense of the tenth section of the Master and Workman Act, 1875, may contract themselves out of the Act of 1880. There is no question that it was the intention of the Legislature when the Employers' Liability Act was passed not to interfere with the employer and his workmen as to the power of making such a contract. Although in the report actually presented to the House of Commons no reference whatever is made to this subject, a paragraph of a draft report already referred to, proposed by the chairman, Lord Sherbrooke, shows that much evidence was taken on it, and that the Committee adopted the view, subsequently endorsed by Parliament, that it

was not advisable to prevent masters from contracting themselves out of the provisions of the Act. The paragraph referred to is as follows:—

“Considerable difference of opinion has prevailed among the witnesses examined before the Committee as to whether the master should or should not be allowed to contract himself out of the liability for negligence of his subordinate agents. On the one side it is urged that the liability to compensate is a great means of preventing accidents, by enlisting the interests of the master as strongly as possible on the side of safety, and that the operatives are too reckless to value the security for an injury which they never expect to suffer. On the other hand, it seems strange to extend the disability which is attached to lunatics on account of their infirmity, to children on account of their tender years, and to sailors, by a very questionable policy, on account of their notorious imprudence, to those men who are the very strength and mainstay of the country, to whom more, perhaps, than to any other class England is indebted for her wealth and her greatness. It is hard to understand why a man should be free to contract in all the other affairs of life and yet be treated as incompetent to judge for himself on a subject with which he must be peculiarly well acquainted, and in which he is deeply interested. It is the opinion of the Committee that in this, as in all other lawful matters, a case of overwhelming necessity must be produced before they make so startling an exception to the ordinary course of law, and that no such case here exists.”

It is true the draft report of the chairman was rejected by the Committee, and, as stated above, no re-



ference to this subject appears in the report actually presented to the House; but the resolution was arrived at not to recommend that it should be made incompetent by express provision to contract out of the proposed Act. This implies, of course, that the Committee were of opinion that this should be permitted. Indeed, in the report of the proceedings it will be found that such provision was voted for by the late Mr. Macdonald and Mr. Shaw-Lefevre, but was negatived by other ten members of the Committee. The House of Commons, by inserting no provision to the effect referred to, proceeded on the assumption that thereby they left the matter of contract as to this question in the hands of the employer and employed. Therefore, there can be no doubt as to the intention of the Legislature.

It was, however, argued in the case of *Griffiths v. the Earl of Dudley* (June 6, 1882, 9 Q.B.D., 357), that the terms of the first section of the Act were so sweeping as to render the workman's express contract not to claim compensation invalid. "The language," it was argued, "was express that in the five cases enumerated in the section the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged at his work. The Act, therefore, sweeps away the contract of service for the purpose of allowing the workman to claim compensation; and where, as in the present case, the contract not to claim compensation under the Act is inseparable from the contract of service, the whole contract is destroyed for that purpose."

Mr. Justice Field, however, said with reference to this point:—"The workman is obliged to rely upon the contract of service; but for that contract he would have no right of action at all; he is only entitled to be upon the employer's premises by virtue of it. I think the Court should take a broad view of the construction of the Act, *having regard to the intention of the Legislature*. I do not think the words of the Act go far enough to compel the construction that the express contract by the workman against the operation of the Act should not take effect. In all the cases referred to in argument in which the Legislature intended to enact that a person shall not be allowed to contract himself out of an Act of Parliament, very express words have been used. As a general rule, entire freedom of contract has been reserved; it has only been interfered with in order to obviate great public injustice. It is legitimate to see what would be the consequences if the construction contended for by the plaintiff's counsel prevailed, because if injustice would result it is unlikely the Legislature intended the construction. I think great injustice would result, because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim full additional compensation when he was injured." Mr. Justice Cave concurred in this view.

Another point was raised in this case. The action was brought under Lord Campbell's Act by the widow of the deceased workman. It was argued that, although it was to be held that the workman contracted himself out of the Act, still his widow had a separate and independent ground of action on account of the loss of

her husband. With regard to this point, Mr. Justice Cave said:—"It was argued that, whether or not the deceased could have bargained away his own right to recover damages, he could not bargain away the right of his family under Lord Campbell's Act. That Act was passed because it was thought a hardship that where a man had sustained personal injury and died without having himself recovered compensation, leaving behind him persons in certain degrees of relationship, those persons should not be entitled to bring an action. *Read v. Great Eastern Railway Company* (June 25, 1868, L.R., 3 Q.B., 555) has decided that the Act gives no new cause of action to the relations, but only a right in substitution for the right of action which the deceased would have had if he had survived. We are bound by that decision, and the cases cited by Mr. Jelf are not in conflict with it."

The case referred to in this judgment is, no doubt, to the effect stated by Mr. Justice Cave, as sufficiently appears from the last sentence of Mr. Justice (now Lord) Blackburn's opinion in *Read's case*:—"The intention of the enactment (Lord Campbell's Act) was that the death of the person injured should not free the wrongdoer from an action, and in those cases *where the person injured could maintain an action* his personal representatives might sue." This judgment was pronounced in spite of what Mr. Justice Coleridge, in the case of *Blake v. Midland Railway Company* (18 Q.B., at p. 109), said:—"Reliance was placed upon the first section, which states in what cases the newly given action may be maintained although death has ensued, the argument being that if the party injured, if he had recovered, would have been entitled to a

solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representatives, but gives to the representatives a totally new right of action on different principles."

Lord Chief-Justice Erle's statement in the case of *Pim v. Great Northern Railway Company* (32 L.J. Q.B., at page 379), was also quoted in *Read's case*. He said:—"The statute, as appears to me, gives to the personal representatives a cause of action beyond that which the deceased would have had had he survived upon a different principle."

The cases, however, of *Read* and *Griffiths* must be held to have settled English law to the effect that the widow of a workman who has contracted himself out of the operation of the Employers' Liability Act has no good ground of action based upon the provisions of that Act.

How does the law stand, however, in Scotland? I do not doubt that it would be held in Scotland, although the point has never, so far as I am aware, been mooted in the Supreme Court, that a workman can contract himself out of the Act. Whether or not it would be held that the widow of a deceased workman who had contracted himself out of the Act had a good ground of action against the master, in virtue of the provisions of the Employers' Liability Act, is a different question, on which I cannot venture to speak with certainty; but I am at present inclined to be of opinion that the workman's contract would not bar the widow's right of action.

By the English law, as we have seen, no common law right accrued to the representative to sue for

damages on account of a personal injury sustained by the deceased. The matter was attempted to be remedied by Lord Campbell's Act, and the terms of that Act were in Read's and Griffiths' cases construed as merely transmitting the right of the deceased to the representatives—that is to say, that by Lord Campbell's Act it was held the right which the injured workman had to sue for personal injury was transmitted to the representative in the event of the injured workman's death. Accordingly if the injured workman himself had no right of action, Lord Campbell's Act, it was held, transmitted no right. But by Scotch common law, husband, wife, parent, or child has a personal right of action for the damage caused by the death of the relation through the fault of the employer. The following statement as to this point by Lord-President Inglis in the case of *Eisten v. North British Railway Company* (July 13, 1870, 8 Macp., 980), may here be given:—

“It cannot be disputed that hitherto, in our law, no such derivative claim has been sustained, except when arising from the relation of husband and wife, or of parent and child, and, on the other hand, it is true that, in the law of Scotland, differing in that respect from other systems of jurisprudence, a claim of this kind is sustained at the instance of a wife for the death of her husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of his parent, when the death has been caused by *delict* or *culpa*, and it is equally true that this claim may be maintained, although the party raising the action cannot qualify any direct pecuniary loss by the death of his relative. It appears to me



that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium*, where he can qualify no real damage, and for pecuniary loss in addition, where such loss can be proved."

As to when *solatium* is recognized by law, I may quote the following dictum in the case of *Dow v. Brown* (January 27, 1844, 6 D., 534), by the Lord Justice-Clerk Hope:—

"Our law recognizes the broad general ground of *solatium* for loss of happiness, status, comfort, and patrimonial interests."

Now, keeping in mind that there is this common law right, reference may be made to the express terms of the first section of the Employers' Liability Act where a personal injury is caused to a workman. "The workman, or, in case the injury results in death, the legal personal representatives of the workman *and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor employed in his work.*"

The Legislature must be assumed to have had the common law right of Scotch representatives in view when the Act was passed, and that independent right of action, it may be submitted, could not be contracted

away by the personal contract of the deceased workman. The cases of Read and Griffiths referred to are, I think, by implication rather authorities to the effect that in Scotland the widow of a deceased workman has a good ground of action in spite of her husband's contract, because the *de quo queritur* (the question under discussion) in these cases was whether the wife had any independent right of action, and it was held there that she had none, the assumption being in both these cases that if there was an independent ground of action under Lord Campbell's Act, there was also an independent ground of action under the Employers' Liability Act.

It may, however, be argued that the contract of service being the basis of the action, and the husband or father being the person to make the contract of service, his contract will bar his representative's claim, the claim being ancillary to the contract of service. Further, it may be urged that the widow during the husband's lifetime, and pending the contract of service, participated in the wage which would not have been given had it not been for the supposed contract of indemnity. It seems to me that this argument is very much reasoning in a circle, because the question really is—Is there a common law ground of action to the representative, and hence a ground of action under the Employers' Liability Act, for the personal wrong suffered by the representative? The widow does not receive compensation for her deceased husband's suffering. Let us suppose a case where the injured workman lingered for some time in great agony. If he recovered he would have been entitled to have had that suffering weighed in considering the *quantum*

of damages to which he would have been found entitled. But the widow by Scotch law has merely awarded to her such damages as are held to have accrued to her personally through the loss of the breadwinner, inclusive of *solatium* for her husband's decease.

It may, however, be here noted incidentally that it was held in the case of *Neilson v. Rodger & Sons* (December 24, 1853, 16 D., 325) that where the pursuer of an action for injury sustained in the service of the employer died during the dependence of the action from the effects of the accident, that the right to recover damages transmitted to the executors of the deceased, and that they were entitled to carry on the action, the suffering of the deceased being part of the claim. Lord Murray in that case said:—"This action was commenced by the deceased during her lifetime, and I think it may competently be carried on by her representatives. I do not, however, mean to lay it down that it could have been raised by them after her death."\*

For the above reasons I am disposed, therefore, to take the view that, although a workman has personally contracted himself out of the Employers' Liability Act, the widow of the deceased would have a good ground of action if death had resulted through one of the causes specified in the sub-sections of the first section of the Employers' Liability Act. The point is one of nicety, and I venture to express the above opinion with diffidence. The question, so far as I am aware, has never been mooted in the Court of Session.

\* See also in connection with this point the Lord-President's remarks in the recent case of *M'Master v. Caledonian Railway Company* (November 27, 1885, 13 R., 254).

It follows from what has been stated above *a fortiori* that, by English law, where the workman has recovered damages for personal injury, but subsequently dies, the personal representatives have no claim for further damages. This, indeed, was decided in Read's case. It seems to me a very nice question indeed whether in Scotland settlement with an injured person would bar the claim at common law of the husband, wife, parent, or child of the injured person if death supervened from the same injury. I am, however, inclined to hold, having in view the explanation by the Lord-President of the common law right of action accruing to the representative, that the previous settlement with the injured party would not bar the representative's claim.

Where, however, the action by the representative is one based upon the statute, I think the words "the workman *or*," etc., show that the remedy is alternative, and that the settlement with the injured workman would bar any further claim at the instance of the representative for the effects of the injury.

An important question is pointed out by Messrs. Roberts and Wallace. It being conceded that it is competent for a workman to contract himself out of the Act, with reference to how such contract shall be made it may be necessary to consider the effect of the provisions of the Truck Act. The following passage will be read with interest with regard to the form which these contracts should take:—"It would seem that the workman would be bound by printed regulations or conditions of service, if they be brought to his knowledge, either by their being posted up at the works or by some other means, and the posting up would at least constitute evidence of a contract based upon these

terms. Upon this point, however, it is thought that in cases similar to *Griffiths v. the Earl of Dudley* a serious difficulty may exist which was not adverted to in that case. There the contract was embodied in printed conditions of employment, and the workmen's fund was partly raised by deductions from their weekly wages. But the Truck Act (1 and 2 Will. IV. c. 37) provides that the entire amount of the wages shall be *actually paid* to the workmen *in the current coin of the realm*, and not otherwise; and the only relevant exceptions to this stringent provision are in favour of agreements for the supply of medicine or medical attendance, or for the advance of money for the workman's contributions to a friendly society, or for his relief in sickness. In these cases there may be deductions for such purposes from the wages, but the agreement to be made valid must be in writing and signed by the workman. Moreover, these provisions are only supplemental to the still more comprehensive enactment that every contract of hiring by which the whole or any part of the wages is made payable otherwise than in current coin is illegal, null, and void. It may be greatly doubted, therefore, whether the contract relied on in *Griffiths v. the Earl of Dudley* was not obnoxious to the Truck Act, and by it rendered illegal, null, and void." (Roberts and Wallace, pp. 466-76.)

The Truck Act is a general Act, applicable equally to England and Scotland. Accordingly, if the doubt as to the decision in Griffiths' case is well founded, as it appears to me to be, it has also a valid application to Scotch law.

(2) *What antecedent steps are necessary to an action laid on the statute?*



By the fourth section of the Act it is provided:—  
“An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death—provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for the want of such notice.”

This section is also to be read in connection with section seven, which is in the following terms:—

“Notice in respect of an injury, under this Act, shall give the name and address of the person injured, and shall state, in ordinary language, the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

“The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

“The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post, and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

“Where the employer is a body of persons, corporate or incorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, any one of the offices of such body.

*“A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.”*

I consider that these sections ought to be amended in certain respects, as will be pointed out hereafter. In the meantime, I direct attention to the following points:—

(1.) That no action will be entertained for personal injury by a workman unless he has either by himself or by some one for him given written notice to the employer within six weeks of the date when the accident happened.

(2.) That the action for personal injury is not maintainable unless an action has been brought within six months from the date of the accident.

(3.) When death has resulted the representatives must sue within twelve months from the date, not of the accident, but of the death.

(4.) That when the action is one for compensation on the ground of the workman's death, the Judge may dispense with the notice if of opinion that there was reasonable excuse for such want of notice.

(5.) The wide terms of the proviso contained in the last clause of section 7. And

(6.) The persons on whom notice should be served.

I will require to make some remarks with reference to each of these points, although I do not think it necessary to go into minute details here. Minute details will be found as to some of these points in the exhaustive and admirable work of Messrs. Roberts and Wallace and in Part IV. of this work.

(1.) The seventh section, which I have quoted above, necessarily infers that the notice for personal injury must be given in writing. It is true that the Act does not expressly say that the notice shall be a written one, but the terms of the seventh section as to the way in which the service of the notice shall be made, and the provision as to name and address of the injured party, etc., can only refer to a written notice. This has been held in various Sheriff Court decisions, but the necessity of written notice is so clear that I do not think the point has been raised in any case in the Court of Session.

In England it was expressly decided in the case of *Moyle v. Jenkins* (8 Q.B.D., 116) and *Kean v. Millwall Dock Company* (8 Q.B.D., 482) that a written notice was imperative. It is unnecessary to say anything further on this point.

There are two recent cases in the Court of Session of some importance in connection with the time within which, and the way in which, notice shall be given. The first of these is the case of *M'Donagh v. P. & W. MacLellan* (June 18, 1886, 13 R., 1000). In that case the injury was sustained on 7th May, and the notice was sent to the employers, which they could not, in course of post, receive before 19th June. It was held that this notice had not been given within

six weeks of the accident, and so that the action could not be maintained under the Employers' Liability Act. The notice was, in point of fact, one day late.

In the case of *M'Govan v. Tancred, Arrol & Co.*, occurring a week later in the First Division, (June 26, 1886, 13 R., 1033), a question was raised as to the method of service of notice. M'Govan was injured in defendants' employment on 15th September. On 20th October he wrote to the Secretary of the Forth Bridge Company, who, on the 21st October, wrote him, telling him that the notice should have been sent to the defenders, and that he had forwarded the letter to the defenders. On 29th October M'Govan wrote to the defenders, being more than six weeks after the accident. In answer to this letter, defenders said that they had forwarded the letter sent by the Secretary of the Forth Bridge Company on its receipt to a certain Insurance Company. It was argued that the notice must be held to be that of 29th October, which was not received by defenders till after the six weeks, it being strongly urged that the letter to Mr. Wieland, the Secretary of the Forth Bridge Company, was not properly served on defenders. "It was neither delivered nor sent to them by registered letter, as required by the Act." Wieland, it was argued, might have torn the letter up, as he was not authorized to act as M'Govan's agent. I may quote the Lord President's opinion, which is of importance with reference to the point under discussion:—"Under the Act of 1880 it is quite indispensable that notice of an action should be served within six weeks, and if it is not so served the action is not maintainable. That is plain enough, but the point now to be considered is regarding the manner of serving the

notice. The statute provides two modes in which it may be done, first, by 'delivering the same to or at the residence or place of business of the person on whom it is to be served.' That is plainly a notice by a 'delivered' letter, as distinguished from a posted letter. The second mode is 'by post by a registered letter,' that is to say, the pursuer may avail himself of the post office as a means of service, and that by means of a registered letter. The reason why the letter is to be registered is, that the pursuer is not to be entitled to avail himself of the presumption of ordinary correspondence, that a letter, when posted, is presumed to have reached its destination, unless it is returned from the Dead Letter Office. But if, in addition to posting the letter, the pursuer registers it, that, under the statute, creates a presumption that the letter did reach its destination. That is expressed by the last clause of the third paragraph of section 7 of the Act, which says:—'And, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.' That clause will not preclude the defender proving as matter of fact that the letter did not reach him; just as little will it preclude the pursuer from proving that, though the letter was not registered, it did, as matter of fact, reach the defender. Now, that has been proved as matter of fact here."

It being imperative, then, that in order to bring an action founding on the Act a written notice within six weeks of the date of the accident shall be given, the next point is who can competently give the notice.

The workman, of course, may give such notice either by himself or by an expressly authorized agent. Sup-



pose a man so injured as, for a period beyond six weeks after the accident, to be absolutely incapable of giving any directions as to notice being sent, could the notice be sent by any one on his behalf without his authority? Messrs. Roberts and Wallace say:—"It is advisable that the notice should be as concise as possible, but it is not necessary that it should have a formal commencement, or that it should be signed by any one. Moreover, the person by whom the notice is to be given is nowhere specified, and there seems therefore to be nothing in the Act to prevent any person who has knowledge of the accident from giving a notice, which will be valid, in favour of the person injured; and that where several workmen are injured by one accident one common notice will be sufficient for all."

This is no doubt a liberal interpretation in favour of the workman of the provisions as to notice, but I incline to believe it is one which will also receive effect in the Court of Session. I am not aware of any case where the point was raised that the notice was given by one who had no authority from the injured party to give such notice.

(2.) The action must be brought within six months of the date of the accident, if founded on the provisions of the statute. Where an action has been brought into Court within six months from the date of the accident, but for some reason or other has been dismissed without any decision on the merits, and without a decree of absolvitor standing against the pursuer, can the pursuer raise a second action at a period beyond six months from the date of the accident? Let us suppose that the expenses of the previous action have all

been paid, to put the case in the most favourable light for the pursuer, and inquire whether, after the expiry of six months from the date of the accident, another action would be maintainable, notice having been duly given within six weeks of the occurrence of the accident. It appears to me that the action would not be maintainable, because the words "the action" in the fourth section can only have reference to an action carried to a determination on the merits. The dismissed action cannot, it appears to me, be regarded as having any bearing upon the question.

In the case of *Johnston v. Shaw*, Dec. 20, 1883 (reported only in *Scottish Law Reporter*, 21, 246), an example of the hardship inflicted by the rigidity of the provision under discussion is given. In that case the action was raised in September, 1883, for an accident which happened in the previous January. The pursuer averred that shortly after the accident his mental faculties became impaired in consequence of it, and that he had been confined in an asylum, where he remained till July. The argument was submitted, in these circumstances, that the provision as to the raising of the action within six months did not apply, as he was *non volens agere* (unable to act) during a portion at least of the time.

Lord Adam, before whom the case came—the action having been removed for jury trial from the Sheriff-Court of Mid-Lothian, after a proof had been allowed—after reading the fourth section, said:—"The facts in this case are these: The injuries are said to have been inflicted on the 16th January, 1883. Notice is said to have been given on the 19th February, 1883, but the action was not raised in the Sheriff-

Court until September, 1883. That being so, I think the case clearly falls within the fourth section of the Act, as an action that cannot be maintained. It was suggested that the six months' limit must be read with this limitation, that the person who is to bring the action must be *volens agere*, and that the period during which he is unable to act is not to be reckoned. But that principle has no application to a limitation of the kind indicated by the Act, which is meant for the protection of defenders, and simply says that beyond a certain time the action shall not be maintained. Upon that simple ground I am of opinion that this action cannot be maintained, and that I have no other duty than to dismiss it." This case went no farther, and I have no doubt whatever that Lord Adam's construction of the statute on this point is sound.

(3.) I may explain that no doubt the provision that the action shall be brought, if founded on the statute within twelve months from the date of the death of the injured workman was in consequence of the analogous provision in Lord Campbell's Act, by the third section of which (9 and 10 Victoria, cap. 93) it is provided, "every such action shall be commenced within twelve calendar months after the death of such deceased person." The six years' limit in the case of injury is a limitation on the English workman's ordinary right of action. By what is known as the English Statute of Limitations (21 Jac. I. c. 16), among other actions, those founded on negligence causing injury to property or person may be brought any time within six years. By Scotch law, on the other hand, except the provision in the Employers' Liability Act under discussion, there is no limitation, except what is

afforded by facts tending to establish the pleas of mora or implied discharge of any claim on the part of the workman.

In connection with this point I may refer to a case which came before me in 1883 (*Crean v. Charles Tennent & Co.*). A workman claimed damages on account of injuries sustained (the loss of an arm) through certain unfenced machinery. The accident was sustained in April, 1880; from that date on to August, 1880, he did no work, but received his full wages, and was then taken back into the employment of defenders, who gave him work suited to his disabled state, paying him the same wages as he had received before the accident. In July, 1882, he was dismissed from the defenders' employment, on account of reasonable suspicions entertained as to his acting improperly. He then raised an action of damages on account of the injuries sustained two years and four months before the raising of the action. Sheriff Clark adhered to my interlocutor, dismissing the action on the ground of implied discharge, and the case did not go farther.

(4.) While written notice cannot be dispensed with where the action is one founded on personal injury, the Judge who tries the action may dispense with the notice where the action is one brought for compensation for the death of the workman if of opinion there is reasonable excuse for the want of notice. The notice, it is to be observed, whether of fatal injury or of injury where death does not result, should in both cases be given within six weeks from the date of the accident. In the case of death I have no doubt that the words "reasonable excuse" will be liberally construed.

(5.) I now come to deal with the important proviso

at the close of the seventh section of the Act. Under that proviso, if written notice be sent, the Judge who tries the action is directed not to hold it invalid by reason of any defect or inaccuracy unless of opinion that there is a combination of two things—viz., first, that the defender has been prejudiced in his defence by the defect or inaccuracy; and, second, that the defect or inaccuracy was an intentional one for the purpose of misleading the defender. On this point Messrs. Roberts and Wallace say—"It should be remarked that both these reasons must exist to render the notice invalid. The defect or inaccuracy here alluded to must be a defect or inaccuracy in what would otherwise be a good notice, as, for instance, if the notice does not in terms name the day when the injury was sustained, but shows it by reference; or if it does not describe the cause of the injury with sufficient particularity, but still does not describe it so as to mislead. If, however, the document relied on by the plaintiff is one which is not in reality a notice of injury at all, it will be altogether useless, and the proviso cannot apply; but it must be observed that the proviso has had a very wide operation given to it, and has been construed on the principle that the Courts of law are not well employed in discovering unsubstantial obstructions to the provisions of an Act meant to benefit working-men." Reference may be made to the English cases of *Stone v. Hyde* (9 Q.B.D., 76), and *Carter v. Drysdale* (12 Q.B.D., 91).

Perhaps, however, the best illustration of the liberal construction which Courts of law are disposed to put upon this proviso is to be found in the Scotch case *Thomson v. Robertson & Co.* (November 14, 1884, 12



R., 121). The only notice sent was a letter from the wife of the injured workman, who, within six weeks from the date of the accident, wrote as follows to the employer:—"5th December, 1883.—Dear Sir, —I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." In that case the Sheriff-Substitute of Haddington dismissed the action on the ground that the notice to be valid "must show that it was written with the view of giving notice of the injury and of an action," and that the letter founded on was certainly not to that effect. It may be noted that it was not pleaded that the Judge in the Sheriff Court was the sole tribunal to determine the question of the sufficiency or non-sufficiency of the notice. This argument might have been urged under the words in the proviso, "unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion," etc.,; and that there is something in this view appears to be the opinion of Messrs. Roberts and Wallace, who, commenting on the fourth section and subsequently on the proviso, say:—"These words appear to constitute the Judge the sole arbiter of the reasonableness of the excuse of want of notice, and it seems that, as his decision is discretionary, no appeal would lie from it" (p. 313). . . . "The terms of this proviso (sec. 7) still more strongly than those contained in sec. 4 point to the County Court Judge as being the sole tribunal to determine the question whether the defect or inaccuracy prejudices the defence, and was for the purpose

of misleading, and the reader is referred to the remarks in the former page upon the point whether an appeal lies from his determination" (p. 323). In the English case, however, of *Stone v. Hyde*, already referred to, the Queen's Bench Division seem to have ruled, where a County Court Judge had dismissed the action because the cause of injury was not stated, that it was not competent for the County Court Judge to have found as a fact without evidence that the defect was for the purpose of misleading, and that consequently there was jurisdiction to decide on appeal that the non-suit in the Court below was wrong. So also in *Thomson v. Robertson*, the Judges, apparently unanimously, thought themselves entitled to consider independently the question whether notice was sufficient, and this, at all events, must be assumed to be Scotch law at the present time. Dealing with the question of notice on the merits with reference to the letter quoted above, the Lord Justice-Clerk said:—"The question is whether the notice was in terms of the statute. The statute says that 'notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date on which it was sustained.' The only objection stated is that the cause of injury is not given; that while an injury was alleged and an 'accident' referred to, there is nothing to connect the accident and the injury as cause and effect; and, moreover, no specification whereby the 'accident,' if the 'cause of injury,' could be ascertained and identified. Now, no doubt the Act does enjoin the cause of the injury shall be stated, but I think the objection taken is too critical. I am not

disposed to entertain, and I do not think that Courts of law ought to occupy time in the discussion of, unsubstantial objections to working men recovering damages under this statute." He then quoted the proviso I am dealing with, and proceeded—"The alleged inaccuracy in this case being want of specification of a cause, *it is a question for the Judge who tries the case whether it has prejudiced the defender.* If in his opinion it has not, then the statute says it shall infer no invalidity in the notice. Taken by itself, therefore, I am not prepared to sustain this objection."

It may be noted in the words italicised the Lord Justice-Clerk assumes that he is the Judge who tries the case, although the Sheriff-Substitute of Haddington had dismissed the action on the ground that no notice had been given under the statute, and in his note at some length had assigned his reasons for so holding.

In summing up the effect of this proviso, Messrs. Roberts and Wallace say:—"The effect of the whole matter appears capable of being expressed thus, that any written document which contains a *bona-fide* version of the fact that injury has been sustained is, if it be duly served, a notice of injury defects in which may be cured by the proviso." If this be sound English law—as I believe it to be—I have no doubt quite as liberal a construction will be accorded by Scotch law to the proviso in question.

(6.) As to the person on whom the notice has to be served, the seventh section requires that the service of the notice shall be "on the employer, or, if there is more than one employer, upon one of such employers." This, I take it, merely means that where there are one or more partners in the business, notice sent to

any one of these partners is good notice to all. (It does not, I apprehend, apply to such a case, for instance, as where there might be joint and several liability on the part of two different and independent employers. In such a case the notice would require to be served upon both in order to succeed in establishing joint and several liability in virtue of the provisions of the statute.) In reference to this point the case of *M'Govan v. Tancred, Arrol, & Co.* (Jan. 26, 1886, 13 R., 1033) is of importance. The observations of the Lord President which I quoted with reference to the period within which service must be made \* have also, as will be seen, a special bearing on this matter.

In connection with the above remarks I may here note an important difference between English and Scotch law. We have already seen that by English common law there was no right of compensation for the death of a workman to his representatives, and that this matter was remedied by Lord Campbell's Act. The law, however, of England differs from the law of Scotland in this respect, that should the employer die before decree has been pronounced against him the action would fall, and no action would be maintainable against his representatives—*actio personalis moritur cum persona* (a personal action dies with the person). Lord Campbell's Act only conferred the right of action on the representatives of the injured party provided the wrong-doer was alive. In Scotland, it need hardly be said, the estate of the deceased employer would be liable in reparation for injuries sustained through the fault of the deceased, or those for whom he is legally responsible, whether such responsibility accrued at

\* See pp. 156-7.

common law or was due to the provisions of the Employers' Liability Act.

I have now discussed two of the subjects set forth *supra*, viz., (1) *Who are entitled to avail themselves of the provisions of the Act?* and (2) *The necessary steps antecedent to an action laid on the statute.*

I now come to the third and fourth subjects specified at page 130, viz., (3) *Can an action at common law be combined with one founded on the provisions of the statute?* and (4) *The proper forum for bringing an action under the Act.* These two points, it seems to me, can be more conveniently taken up and dealt with together.

By the sixth section of the Employers' Liability Act, sub-section 1, it is provided:—"Every action for the recovery of compensation under this Act *shall be brought in a County Court*, but may, on the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed." Sub-sections 2 and 3 refer to the appointment of assessors for the purpose of assessing compensation where no jury is empannelled. In the ordinary exercise of their office Sheriff-Substitutes and Sheriffs have been in the habit of assessing damages at common law themselves in Scotland, and as matter of practice, the provisions as to assessors have not been taken advantage of in Scotland. I will have a word or two to say later on with regard to English County Court procedure in the matter of juries and assessors.

In the latter part of the same sixth section it is provided:—"County Courts shall, in respect to Scotland, mean the Sheriff Court, and shall, with respect to Ire-



land, mean the Civil Bill Court. In Scotland an action under this Act may be removed to the Court of Session at the instance of either party in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act, 1877. In Scotland the Sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries."

It may be well at this point to refer to the form and manner of appeal provided by section 9 of the Sheriff Court Act, 1877. That Act extended the jurisdiction of Sheriffs to certain classes of action not before competent in the Sheriff Court, and the section referred to fenced that extension with the proviso that the defender in any of those actions to which the Sheriff's jurisdiction had been extended should have the power of removing the cause to the Court of Session at any time before the closing of the record or for six days thereafter by lodging a notice in the following terms:—"The defender prays that the process be transmitted to the Court of Session." The sixth section of the Employers' Liability Act, it is to be noted, makes the power of removal competent *at the instance of either party*.

Actions at common law in the Sheriff Court, under the 66th and 73rd section of the Court of Session Act, 31 and 32 Vict., cap. 100, and the older statute 6 Geo. IV., cap. 120, sec. 40, could be removed for jury trial to the Court of Session within 15 days after an order for proof had been made in the Sheriff Court, but the form of appeal is different, viz.:—"The pursuer (or defender or other party) appeals to the Division of the

Court of Session." The reason of my dwelling upon these forms will be discovered farther on. Meantime it is to be pointed out (1) that all actions based upon the Employers' Liability Act must in Scotland be raised in the Sheriff Court, and (2) that it is competent to combine alternative conclusions for damages founded on common law and the statute respectively, but that such actions must in the first place be raised in the Sheriff Court. With regard to these two points I have one or two observations to make.

(1.) The terms of the sixth section are so express that it does not seem to me to admit of doubt that any action founded upon the statute can be initiated elsewhere in Scotland than in the Sheriff Court, but in the case of *M'Avoy v. Young's Paraffin Oil Company* (Nov. 5, 1881, 9 R., 100) the point incidentally came up, and Lord Young referred to it as one which might admit of possible argument. He said:—"In cases of the class classified in the statute, that which is theretofore a defence is not to be one hereafter; and if it appear in the course of trial that there is no good cause of action established but for the Employers' Liability Act, the question may arise whether the action, if brought originally in this Court upon no good ground of action except that which the Employers' Liability Act gave, could be sustained. Probably that would be avoided by bringing the action in the Sheriff Court and then bringing it here. It is an awkward provision, and has not been, at least with reference to our practice here, sufficiently considered. . . . The greater difficulty—the greater practical difficulty—is one that does not arise here—namely, whether an action in this Court would be shut out—all actions requiring to

be in the Sheriff Court—if it should appear in the result that the only cause of action established was under that statute only.”

This action, it may be explained, was one brought by the widow and four children of a workman who had been fatally injured in a pit of defenders', in the Sheriff Court of Midlothian, and concluded for £1,000 in name of damages at common law, “or otherwise, in the event of its being found that pursuer had no claim against the defenders at common law, but only under and in virtue of the Employers' Liability Act, 1880, the sum of £300 damages.” The case was appealed to the Court of Session, and on a motion before the Lord-Ordinary to adjust issues for jury trial, the defender opposing the motion and moving that the case should be tried before the Lord-Ordinary without a jury, Lord Lee allowed the proof to be taken before himself. Judgment was appealed to the Second Division, who unanimously held that the case was one for jury trial, and sent the case back that issues might be adjusted. In giving judgment on the above point Lord Young made the remarks quoted above.

Messrs. Roberts and Wallace say:—“Actions under the Act are not to be commenced in a superior Court, for another section provides that every action for recovery of compensation under the Act shall be brought in a County Court, or in Scotland or Ireland in the Sheriff Court and Civil Bill Court respectively. It is apprehended, therefore, that if an action were originally to be brought in a superior Court upon no good ground of action except under the Act, it must fail, just as if the Act had never been passed.” The authors refer to the English case of *Reg. v. The Judge*

of the City of London Court (14 Q.B.D., 905), and also make reference to the statement which we have quoted from Lord Young. In England it would appear that it is a matter of discretion with a superior Court whether on an appeal being taken the action will be kept or sent back to the inferior Court. In Scotland, under the provisions quoted above, either party seems to have the discretionary power of removing the case at his own instance to the higher Court.

(2.) In the case of *M'Avoy*, already referred to, it seems to me that the right to combine the common law claim with one founded upon the provisions of the statute in an action originally brought in the Sheriff Court, and to proceed with such combined claim in the Court of Session, after removal in the way explained above, was practically recognized.

In the later case of *Baird v. Morrison* (Dec. 2, 1882, 10 R., 270), Lord Lee said, after referring to certain unreported cases where issues had been adjusted for jury trial, and where, as I understand, they had been removed from Sheriff Courts, although based both on common law and on the Employers' Liability Act:—"It is now again pleaded, however, that the removal of the action to the Court of Session infers the abandonment of it so far as not founded on the statute; or, at all events, that such removal brings up only so much of the action as is founded on the statute; and it was stated to me that the Second Division of the Court in the case last mentioned (*Hendry v. Cassels*) had given effect to this plea in varying the issue then adjusted. . . . I think it right in the meantime to adhere to the view which I

understood to be laid down in M'Avoy's case, and which appears to me irreconcilable with such a contention that the pursuer is by the statute put to his election between a claim at common law alone and a claim under the Act."

The case came up in the Second Division, and the Lord Justice-Clerk said:—"The only question raised by this reclaiming note, which proceeds upon leave granted by the Lord-Ordinary, is whether it is a competent proceeding or whether it brings up only that part of the action which is based, or may be supposed to be based, on the recent Employers' Liability Act. I am very clearly of opinion that the Lord-Ordinary has dealt quite rightly with the case in appointing an issue to be lodged. I cannot conceive that the Legislature ever intended that there should be both a common law and a statutory action. I think the plea in that part of the case proceeds upon a misapprehension of the nature of the operation of the statute. It does not truly confer a new ground of action." These cases, apart from numerous other cases which have since been appealed from the Sheriff Court to the Court of Session, where common law conclusions as well as conclusions under the statute were combined, appear conclusively to settle that where an action founded upon such combined claim was raised in the Sheriff Court it could competently be removed to the Court of Session, and be dealt with there both at common law and under the statute.\*

\*See in connection with this point the very recent case of M'Donagh v. P. & W. MacLellan (13 R., 1000), in which the Second Division, on an appeal from the Sheriff Court, sustained the dismissal of the action of the Sheriff *quoad* the statute only, and ordered issues for a trial on common law grounds before one of themselves.



The following letter, however, which was issued by Mr. Banks, the Keeper of the Rolls, on 10th November last, by the authority of the Lord-President, to Mr. Pearson, Sheriff-Clerk Depute, Glasgow, would seem at least to indicate that the head of the Court might be disposed to take a different view:—

“ Parliament House,  
“ Edinburgh, 10th November, 1885.

“ I have to acknowledge receipt of your letter of 5th inst., with Sheriff Court process, *I.C.* Peter M'Cormick *v.* Laidlaw, Sons, & Caine, Limited, which you transmit to me in terms of the Act 43 and 44 Victoria, cap. 42, in consequence of the pursuer having lodged a note in process praying for the transmission of the proceedings to the Supreme Court.

“ Having laid the process before the Lord-President, I am to inform you that his Lordship is of opinion that this case cannot competently be transmitted to this Court in the manner proposed, as the action is not brought exclusively under the Employers' Liability Act, but concludes primarily for damages at common law, with only an alternative conclusion for damages under the Act. The statute, sec. 6, provides that in Scotland any action under *this* Act may be removed to the Court of Session, and it is not competent to transmit any common law cases to the Court of Session except those specified in the Sheriff Court Act, 1877, 40 and 41 Victoria, cap. 50, sec. 9.

“ I am also further to point out to you that in the present case the Employers' Liability Act is not libelled either in the alternative conclusion of the petition or in the condescendence, nor is there any

plea regarding it, the only reference in the record to this Act being the statement in condescendence vi., that the pursuer has given notice in terms of the Act to the defenders of his having been injured, and has claimed compensation, which they refuse, and that the action has accordingly been rendered necessary. His Lordship considers that in all cases brought under the Employers' Liability Act it is necessary to have a distinct statement or notice that it is brought under that Act to entitle the parties to transmit the case to the Supreme Court.

"I am therefore directed by his Lordship to return the process to you (which I now do), and to request you to see that the requirements pointed out by his Lordship are fulfilled before transmitting such cases here in future, and to make them known to the profession and the other Sheriff-Clerks Depute of your county."

Meanwhile, however, the decisions referred to must be held as ruling the law of Scotland to be what I have stated above.

(5) *The limit of compensation allowed under the Act.*

It was resolved at the time of the passing of the Act that the limit of compensation should not be put on the same footing as that which could be recovered at common law, and in the 3rd section of the Act it was provided "the amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury."

There are some matters which I think require to be referred to by me, but minute criticism of various different points which have arisen and which might arise under this section is to be found in the work of the English authors referred to above (Roberts and Wallace, pp. 372 to 379 inclusive).

I propose to refer to one or two points under the following heads:—(a) What different circumstances have to be taken into account in estimating the three years' average? and (b) Where the action is one for behoof of widow and children, or at the instance of either independently, in what way is the sum in name of compensation to be allocated?

(a.) Supposing a man to have been employed in an inferior grade up to within a month of the accident, at which date he was taken into a higher grade of employment and paid at a proportionally higher rate, would his wages be calculated as on the average of the previous three years; or would the basis of calculation be the rate at which he was paid at the date of injury?

It is probably safe to assume that in all cases where a married man in the prime of life has been killed, the *maximum* of compensation awardable under the Act would fall to be granted unless in very exceptional circumstances—*e.g.*, the widow who sued had lived apart from the injured workman, and had not been supported by him. Even in such a case it might be argued that she was entitled to compensation on account of the right to exact alimentary support from him, of which right his death had deprived her.

In cases of serious, although not fatal injury—*e.g.*,

the loss of a right arm—to a man in the prime of life the full amount of compensation exigible under the Act would probably also fall to be awarded under the Act, but in the majority of cases raised under the Employers' Liability Act the amount of damages which falls to be awarded when liability is established is considerably less than the full limit under the Act. It is accordingly only in cases where it is thought equitable that the full statutory amount should be awarded that points such as those I have referred to above require to be considered.

I am of opinion that the fair estimate where the workman injured or killed is at the date of the accident being paid as a workman of a higher grade must be based upon the wages earned at the time of the accident. I am not aware of any case in which this point has formally been determined, but the opinion which I have expressed appears also to be the view of Messrs. Roberts and Wallace, who say (p. 375):—"It is suggested also that in the case of a workman promoted from one grade to another during the three years the compensation is to be determined by the grade in which he is at the time of the injury, and not by his actual earnings during that period."

Another point on which I am rather disposed to take a different view from that which the English authors referred to express, though I do so with considerable diffidence, is as to the effect of a long-continued strike or strikes on the estimate of the average. Let us suppose a case where in the district in which the injured workman was employed there had been periods of non-employment during the three years amounting in all to six months, would the three years'

average be held to be the wages earned during the two years and six months when the man was actually working, or would they be the wages applicable to the period of the full three years, on the footing that work had been obtainable during the whole period. I incline to the opinion that the estimate can only be based upon the actual period of employment. No distinction, so far as I can see, can be drawn between work prevented by strikes or by depression of trade; and supposing during the three years' employment work was unable to be obtained in a particular branch of trade in consequence of there being none to give during six months, it does not seem to me that a greater demand can be made upon the employer than the wages which were actually earned during the three years.

Messrs. Roberts and Wallace, however, say—"Various questions may arise upon the words of section 3 of the Employers' Liability Act, such as whether 'employed' means continuously employed, or whether strikes, etc., are to be taken into account. Having regard to the objects which it must be taken that the Legislature intended to effect, viz., to give the injured man or his representatives what is under the circumstances of the case a fair compensation, it would seem that the former construction should be given to the word. It is thought that the Legislature in fixing this limit must be taken to have once for all considered all the contingencies which ought to be taken into account, whether such contingencies be personal to the workman, such as health and duration of life, or belong more exclusively to the fluctuations and disturbances to which trade is subject."

But what if the injured workman has been off work



in consequence of an illness or an accident for, let us say, a period of six months out of a period of three years? That period, I think, is certainly not to be taken into account, because a deduction of working time entirely personal to that particular workmen, and the estimate is to proceed upon the average earnings, not of the workman himself, but of workmen in the same grade, who, generally speaking and presumably, are able-bodied and fit for work during the whole period.

(b) Assuming the *maximum* of compensation which falls to be awarded to be £300, and if this sum falls to be allocated between a widow and, let us say, five children, in what proportions is the sum to be allocated? I submit this is a subject which should have been expressly dealt with in the Act itself, and there seems to be varying practice. In Scotland a married man with a family who leaves movable property behind him is only able to test (that is, to leave by will) one-third of it. Of the remainder one-third goes to the wife and the other third to the children.

No doubt the sum awarded as compensation for a workman's death is not exactly succession to his representatives, but if the principle which regulates succession were to be applied to a sum of £300 awarded as compensation for fatal injury a widow would obtain £100, and the remaining £200 would be divided in equal proportions between the five children, irrespective of their age.

In a recent jury trial in the Court of Session, which I believe is unreported, *Main v. W. B. Dick & Co.*, there was a sum of £300 which fell to be divided between the widow of a labourer aged 45, she herself

being 43 years of age, and five children, whose ages varied from 17 to 7 years respectively. The jury awarded £100 to the widow, £15 to the eldest child, earning 9s. per week; to the other children, who, I understand, were earning nothing, they awarded £25, £45, £50, and £65 respectively according to age, the youngest receiving the largest amount. I observe in the case of *Simpson v. Wm. Arrol & Co.*, a Dundee case (*Scottish Law Review*, vol. I., 126), where compensation fell to be awarded for the death of a workman who had left one child and a widow, Sheriff Cheyne divided the amount of compensation between the two. No definite law can, I think, be laid down. The *quantum* of compensation being determined, the judge or jury, taking the whole facts into consideration, is entitled to allocate the sum in such a way as seems best to suit the justice of the case.

In a case before myself, *Donnelly v. D. F. & J. Alexander* (not reported), the following note shows the method in which I allocated a sum of £270 for the death of a husband and father between the widow and children. I gave £150 to the widow and £120 to the children on the following grounds:—"The children's ages vary from ten years to three months. I propose simply to give £20 to each child. I had in all a sum of about £270 to divide between the widow and children. I would not have given the widow more than one-third of the amount except upon the footing that the £120 allocated to the children should be left in the Savings Bank for behoof of the children; not to be touched unless in the case of extreme necessity, she in the meantime undertaking the complete burden of their support. I am not, of course, wishing to pro-

hibit the payment of part of the money before the children attain full age if it is seen that there is some special object for the child's good to be got other than for the purposes of the child's support. If, of course, the mother should sink into extreme poverty, I do not say that in such circumstances part of the money should not be applied for the children's necessities. In such a case I think it would be only right that this should be done. But as long as the mother is able to support the children, these small funds should not be touched except for some special object distinctly for the child's advantage. In my previous interlocutor I contemplated certain trustees being named for behoof of the children. I have, however, seen Mr. Meikle, the manager of the Glasgow Savings Bank, and as I find that this is not indispensable, and that the directors will see to the money being applied for the children's behoof, I think it unnecessary to delay the winding up of the case."

I now come to what may be called the kernel of the Act. We have seen that it has been laid down in more than one Scotch case that the effect of the Act is merely in certain specified circumstances to remove what otherwise would be a valid defence, but I may here repeat Lord Young's observations already quoted in the case of *Morrison v. Baird*:—"Theset atute does no more than remove a defence in the class of actions to which it refers, which was theretofore competent, by providing that an employer against whom such action is raised, shall not, in certain circumstances specified in the statute, be entitled to plead what the common law entitled him to plead—that he is not responsible to one employé for the fault of others. The statute

does no more than remove that defence in certain specified circumstances.”\*

This, then, being premised, I have to deal with five different contingencies, on which arising, the master's defence is removed in the event of injury or death happening to one of his servants through the negligence of some person or other.

The first of these is as follows:—

*“By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of employer.”* This has to be read in connection with sub-section 1 of section 2 of the Act, which provides that the workman shall not be entitled to compensation under sub-section 1 of section 1, *“unless the defect therein mentioned arose from or had not been discovered or remedied, owing to the negligence of the employer or of some person in the employment of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.”* These provisions have to be taken up in conjunction with the third sub-section of section 2, which is that the workman shall not recover *“in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.”*

We have already seen in what circumstances an employer is liable at common law for defects in system and for defects in machinery or plant. To

\* See also the opinions of Smith and Matthew, J.J., in *Weblin v. Ballard* (17 Q.B.D., 122), and Wills and Grantham, J.J., in *Thomas v. Quartermaine* (17 Q.B.D., 414).

what extent do the statutory provisions which are quoted above extend the liability of masters? It is to be observed that the first sub-section of section 2 contains the words "unless the defect arose from or had not been discovered owing to the negligence of the employer." That defects in ways, works, machinery, or plant, which have caused injury to servants of a particular employer, and which defects have not been remedied owing to the negligence of the master, entail responsibility at common law, is, as we have seen, a sound general proposition.

What, then, was the reason of affirming in the statute that which was recognized by common law? Messrs. Roberts and Wallace thus explain how in their opinion the words "of the employer" came to be inserted:—"The insertion of the employer's name in section 2 in respect of liability for a defect in the machinery, etc., may fairly be explained thus: Actions under the Act, as will be seen, must be brought in the County Court, where the ordinary limit of damages recoverable is £50. Generally speaking, it will be a matter of extreme difficulty to ascertain precisely before the trial whether the defect be due to a fellow-servant's negligence or that of the employer himself. If, then, there were no such provision in the Act, and at the trial it appeared that the defect was owing to the negligence of the employer himself, either the plaintiff would fail in the action, and have to pay the costs, or he would have to fall back by amendment upon his common law right, and could then recover not more than £50. It seems, therefore, that it was to obviate this result that the employer's name was inserted, so as to save the expense of a second action in the High Court."



I imagine this is mere conjecture, and that it is not founded upon anything which transpired at the time of the passing of the Act through both Houses of Parliament; but it is to be observed that the reason given is one which has no application to Scotland, because there is no £50 limit in the Sheriff Courts of Scotland. The reason given may be the correct one, and though it has no application to Scotland, still that does not render it an improbable one; but, no doubt, if this was the reason which led to the insertion of the words "of the employer," it would have been more logical to have expressly drawn a distinction in the cases of England and Scotland.

I submit with diffidence the following reason for the insertion of the words "of the employer":—As we have seen, sub-section 1 of section 1 and sub-section 1 of section 2 have to be read in connection with sub-section 3 of section 2. At common law it has been pointed out, although the decisions are not uniform on this point, that where the master does not take reasonable care as to the system of working or as to the sufficiency of the machinery and plant employed, the balance of authority is to the effect that he may escape liability for injury sustained by a workman if the injured workmen worked on knowing the danger, and it could be predicated that he accepted the risk as one incident to the employment.

Now, is the fair meaning of the words "of the employer" in sub-section 1 of section 1 not to be found in a construction of the third sub-section of section 2 to the effect that the master shall not be allowed to shake himself free from responsibility on the ground that the workman knew of the danger,

if the workman knew that he (the master) was aware of the defect in the ways, works, or machinery which brought about the accident. The third sub-section referred to, it is to be observed, contemplates that the workman shall be barred from recovering if he fail to give information of a defect to the employer or some person superior to himself, *unless he was aware* that the employer or such superior already knew of such defect or negligence.

It will be necessary for me to refer more specially to the precise terms of the third sub-section, referred to hereafter, but in the meantime I submit as a reasonable explanation of the insertion of the words "of the employer" in sub-section 1 that this was specially designed to prevent the master's plea that the workman was working in face of a known danger being entertained in actions laid on the statute where the injured man knew the master was in the knowledge of the defect which brought about the accident, and where negligence on the employer's part in not seeing to the remedying such defect is proved or admitted.\*

Passing, then, from this point, there are three subjects which I will require to take up and deal with one by one: (1.) What constitutes negligence? (2.) To what extent can the master delegate the duty of seeing as to ways, works, machinery, and plant? (3.) What are to be accounted defects in the condition of ways, works, machinery, and plant?

(1.) I did not, in considering the question of the master's liability at common law for physical injury, go

\* This was written before the report of *Weblin v. Ballard* (17 Q.B.D., 122) was issued.

into the question of what constitutes negligence. Some remarks on this are, I think, necessary, and what is said as to this in connection with the first sub-section has also reference to negligence in the other sub-sections. Negligence infers fault somewhere. If there be neglect of ordinary and reasonable precautions for the safety of workmen on the part of employers, or on the part of some one for whom the employers are responsible, then there is *culpa* or fault, for which the master has to answer.

What are ordinary and reasonable precautions can only be predicated having regard to the varying circumstances of each particular case. But in order to make the master liable, the finger must be directly pointed to some definite act of commission or to some omission founding on which it is demonstrable that there was *culpa* or fault on the part of some one. Thus the master, we have seen, as laid down in the case of *Wilson v. Merry*, is guilty of negligence or fault where he has failed to take due care in the selection of competent men for responsible duties. See also the recent case of *Cook v. Stark* (15th Oct. 1886, 24 S.L.R., 5). Where, for instance, a master selected an ordinary foreman in his employment to supervise work which required the skilled knowledge of an architect, and an accident happened through the ignorance of the skilled knowledge requisite, the master would be liable, because there was negligence on his part in not seeing to the capability of the person employed to superintend work requiring a skilled knowledge of the subject. But there would be no negligence on his part if he employed a qualified architect to superintend this work, and through the architect's fault an accident happened, because then

it would be held that he had taken ordinary and reasonable care in the selection of a competent person.

Even where the master steps in himself and commits an error of judgment, whereby injury has resulted, provided he is a man competent to act as his own foreman, in such a case it has been held that there is no liability on the ground of negligence or *culpa*.

Thus in the case of *Seeley v. Jackson*, October 18th, 1882 (20 S.L.R., 11)—not reported in *Rettie*—injury resulted in connection with operations under the direct superintendence of one of the partners of the employers' firm. A number of workmen were engaged in conveying a large iron casting from the moulding-room of the defenders' iron foundry to the courtyard. The report from which I am quoting bears:—"The floor over which the casting had to be conveyed to the yard was somewhat rough and uneven, but not more so than was common in moulding shops of the kind. The principal depression was one near the door, and on it iron plates had been laid to facilitate the passage of the bogie upon which the casting was being removed." The report is not very full, but I gather that the bogie broke down in consequence of this attempt to get it over this depression, and injury was caused to one of the workmen in consequence. The Second Division of the Court of Session refused to hold there was fault, although it certainly would appear that there was error of judgment in supposing that the bogie with its weight could with safety be propelled over the depression. The error of judgment in this case, it is to be observed, was the master's own.

A more significant example, perhaps, of the same

theory is to be found in the case of *M'Manus v. Hay* (17th January, 1882, 9 R., 425). In this case the defender's foreman had elected to work as a labourer in connection with the shifting of a certain steam-engine. When the engine had been raised some inches from the ground, the foreman, with the object of placing a brick under it, let go his hold for a moment, and in consequence of this act one of the four workmen engaged in the removal of the steam-engine got a finger severely crushed. Now, there was undoubtedly here error of judgment on the part of the foreman, but that, the Court held, was not negligence or *culpa*. Lord Young in this case said:—"But still there must be negligence, and such negligence as would infer legal responsibility for the consequences;" and it was held in that case that there was no such legal responsibility. The same Judge's dictum in connection with this point in the case of *Seeley v. Jackson* (referred to above) may also be given:—"Our law undoubtedly is that in every contract between employer and workman there is an implied term that the workman takes the risk of all ordinary accidents attending a more or less risky trade, leaving a claim for compensation only in circumstances where the accident is attributable to *culpa*."

But in connection with this question reference must also be made to the case of *Bowie v. Rankin & Company* (June 15, 1886, 13 R., 981). This action was originally brought in the Sheriff Court in Glasgow before myself. The rubric bears:—"A propeller blade for a steamship two tons in weight was placed on a four-wheeled bogie to be removed from the workshop, and the bogie having to pass over a part of the floor where there was depression filled up with shavings,



and covered with an iron plate. The foreman in charge did not detach the block and tackle (attached to the roof of the workshop) by which the blade had been hoisted into the bogie, hoping thereby to keep the blade steady on to the bogie. When the bogie reached the defective part of the floor, it sank into it and so slipped from beneath the blade, which then swung back on the block and tackle, and severely injured a workman who had been stationed by the foreman behind the bogie to pinch forward its wheels. The injured man brought an action of damages against his employer. *Held* that the pursuer was entitled to damages, the Court being of opinion that, while the precaution of leaving the block and tackle attached might be proper in itself, the foreman ought to have foreseen the probable consequence if the bogie slipped forward, and not have placed the workman behind the bogie."

The way in which the accident happened, I held, was as follows:—The block and tackle were attached as described above with the object of safety, and with the intention that there should be no detachment until the bogie had got over the spot where the iron plate was laid, these depressions in iron foundries of the kind being, as previously explained in *Seeley v. Jackson*, common if not invariable. The foreman posted the pursuer on a machine at the side of the bogie with a pinch to pinch it on over the iron plate, and the conclusion at which I arrived was that the accident happened through the pursuer pinching at the same time as the order was given to hoist with the block and tackle. The propeller blade being partially raised, the pinching shot on the bogie, and the pro-

propeller blade swinging in the air jammed the pursuer's leg against the machine on which he was standing in such a way as to inflict serious injury. I held that there was an error of judgment on the part of the foreman in putting the pursuer in such close proximity to the propeller blade when the order was given to hoist it with the block and tackle, at the same time holding, on the authority of *Seeley v. Jackson* and *M'Manus v. Hay*, that the masters were not liable for what was merely an error of judgment.

The Lord Justice-Clerk, from whose statement of facts no doubt the rubric is taken, said in the course of his judgment:—"The block and tackle were not detached from the blade when it was placed on the bogie, the intention apparently being to keep the blade in its position on the bogie as it passed over the defective part in the floor, but unfortunately the filling up of wood gave way—I suppose underneath the unusual weight of the blade—and the bogie in consequence began to travel down an inclined plane, with the result that, owing to the increased impetus which it thus acquired, it slipped from beneath the blade, which then swung back to the perpendicular on the block and tackle, and jammed the pursuer against the wheels of the boring machine, injuring him severely." Now, as I have previously explained, this was not the result of the evidence to my mind. But taking the facts to be as laid down by the Lord Justice-Clerk, he still, as it appears to me, holds, and his opinion was concurred in by the other Judges, that the masters were responsible for the foreman's error of judgment, although the foreman was, to the best of his ability, applying his mind to the question of what required to be done in

the interests of safety. After stating his impression of the facts, Lord Moncreiff went on to say:—"Now, when the foreman (Hornal) had to exercise his judgment on that occasion, there were two things which he ought to have taken means to provide against. The first was that the blade might fall off the bogie, and that danger appeared to him most imminent; the other was that the bogie might run, as it actually did, beyond the swing of the tackle. The question is whether his employers are liable for this result? I am of opinion that they are. It is plain that the depression might have been filled up before these operations commenced and ought to have been filled up, for it seems quite certain that if the hole had not been there the bogie would have gone quite easily and safely." This last sentence of the Lord Justice-Clerk would seem to imply that, apart from the foreman's error of judgment at the time of the accident (sub-section 2) there was ground for holding also that there was some defect in the ways, etc., under sub-section 1, for which the master was responsible. Lords Young and Craighill are simply stated to have concurred, but Lord Rutherford Clark's opinion seems to me to the effect that the foreman's error of judgment fell to be regarded as negligence.

I have referred to this important case at some length, because in the view of this decision it is not now, I think, possible to affirm, on the authority of *Seeley v. Jackson* and *M'Manus v. Hay*, that error of judgment may not be construed as negligence.

I am not sure that there are any English cases which go the length of laying down that an error of judgment is not to be regarded as *negligence*. In "Shearman and Redfield's Law of Negligence" the

word is thus defined :—"Negligence signifies primarily the want of care, caution, attention, diligence, skill, or *discretion* in the performance of an act by one having no positive intention to injure the person complaining thereof." In the case of *Blyth v. Birmingham Water Works Company* (11 Ex., 781) Baron Alderson defined negligence to be "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or the doing something which a prudent and reasonable man would not do." He then went on to say "the defendants might have been liable for negligence if unintentionally they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done." In the case of *Degg v. Midland Railway Company* (26 L.J. Ex., 171), it was pointed out that negligence was not "absolute or intrinsic," but "always relative to some circumstance of time, place, or person."

Baron Rolfe remarked in the case of *Wilson v. Brett* (11 M. & W., 115) that he could see "no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet."

I rather think that in England if an accident was caused by an error of judgment which no ordinarily prudent man would in the circumstances have fallen into, such error of judgment would be construed as negligence, and, having regard to *Bowie v. Rankin & Co.*, perhaps this is also the law of Scotland despite the previous dicta in *Seeley v. Jackson* and *M'Manus v. Hay*.

In construing the word negligence in the Employers'

Liability Act, I may perhaps add that I do not think any different construction can be put upon that word than falls to be put upon it in connection with injury occasioned to a member of the outside public. The word negligence has only the one legal signification; and, indeed, were any other construction possible it would seem to be removed by the express terms of the concluding portion of the first section of the Act, by which it is provided that in certain specified cases the workman or his legal representatives "shall have the same right of compensation and remedies against the employers as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

(2.) *To what extent can the master delegate the duty of seeing as to ways, works, machinery, and plant?* As we have seen at an earlier stage of this work, the master is bound to exercise ordinary and reasonable precautions with reference to the safety of the ways, machinery, and plant connected with his business. It is not, however, necessary either that he should personally superintend the furnishing of proper machinery, or that he should personally superintend its being maintained in a state of proper efficiency. In many cases, if such were the law, there would be no security for safety, because the master would not be practically qualified to have an opinion as to its stability. He therefore discharges his duty by supplying plant or machinery from men who have a good reputation for the manufacture of the plant or machinery required in his business; by seeing, so far as this is practicable, that its sufficiency is tested from time to time, and by entrusting to some person competent the duty of



ascertaining that it is being kept in a proper state of efficiency and security. Therefore, I take it that the answer to the question propounded above is that the master is entitled to the fullest extent to delegate to competent persons in his employment the provision and superintendence of plant and machinery used in the business, as well as the seeing to the safety of the ways and works generally. No doubt it might be an element in considering whether the master was responsible that he had bought certain plant and machinery used in his business second-hand, at a cheap rate, and to a certain extent worn; at all events, it would seem reasonable that such a fact as this would make it necessary to use more stringent precautions in the way of supervising and testing from time to time the sufficiency for the purpose intended of such plant and machinery.

In no case is the master liable for latent defect *per se* in plant and machinery, although either he or the person entrusted by him with the duty of supervising the plant and machinery may be held guilty of negligence if there has been a failure to use ordinary and reasonable precautions as to testing, which would have revealed a latent defect, which had caused injury.

The important alteration effected by the first subsection of the first section of the Employers' Liability Act is this, that while previously it was the law that if the master did not personally supervise the sufficiency of the plant and machinery used in the business, and see personally to the ways and works being kept in a proper state, he was bound to appoint a competent person for the purpose, but if this was done there was no liability on his part for a failure of duty on the part

of such competent persons ; now, to the extent of compensation allowed by the Act, the master has to answer for any failure of duty with regard to these matters, just as if the failure was due to his own personal negligence.

A good illustration of what I have been saying is, I think, to be found in the important Scotch case of *Fraser v. Fraser* (June 6th, 1882, 9 R., 896). In that case, which has been previously referred to, a workman was killed by a rope breaking, the workman having been engaged in attaching a lightning-conductor to a chimney stalk. In an action brought by the workman's representatives the proof did not disclose the defect which caused the accident, but the evidence of skilled witnesses showed that it might have been caused by a "nip" (a defect in the centre), which could have been detected by the hand of a skilled person, and that no examination had taken place, and the employer was held liable in respect he had not caused the rope to be examined by a skilled person before use. The action was raised in the Sheriff Court of Aberdeen, and both the Sheriff-Substitute (Dove Wilson) and the Sheriff (Guthrie Smith) concurred in holding that there was liability, and their judgment was affirmed by the Second Division of the Court of Session.

The following observations in the case referred to by Sheriff Guthrie Smith (who has written a treatise on the law of reparation) may be given in connection with the subject I am discussing:—"The relation so constituted was not that of contractor and employer, but that of master and workman, and one of the duties devolving upon defender in virtue of the relation was

to take care that the rope used for hoisting the deceased was, as far as could be seen, good and sufficient. This obligation is not affected by the recent Act further than this. The duty of examining the rope to see that it was free from defect might have been performed either by the defender himself or some one for him. In the latter event, prior to the Act, any failure in the performance of this duty by the person to whom it was entrusted would have been the fault of a fellow-workman, for which the master is not responsible. Now, returning to the earlier and sounder view expressed by the Judges in Scotland, a master cannot get rid of the responsibility of attending to the duty of 'seeing that the ways, works, machinery, or plant are in proper condition' by entrusting it to another. He may still, as before, hand it over to a deputy, but he is answerable for the deputy's negligence."

The case of *M'Laughlan v. Colin Dunlop & Co.* (Dec. 21, 1882, 20 S.L.R., 271, not reported in *Ret-tie*) will be found instructive with reference to the distinction between common law and the statute as to a master's responsibility in connection with plant and machinery. This action arose out of an accident which happened prior to 1st January, 1881, when the Employers' Liability Act came into force, and the Judges of the Second Division pointed out how if the case had fallen to be decided under the provisions of the Employers' Liability Act a different result would have been arrived at by them, but the action being one at common law it was decided in favour of the masters.

(3.) *What are to be accounted defects in the condition of ways, works, machinery, and plant?* The meaning

of the word "machinery" is sufficiently intelligible without any explanation.

"Plant" is, I think, properly enough defined in Wharton's Lexicon as "the fixtures, tools, machinery, and apparatus which are necessary to carry on a trade or business"; and this definition is quoted with approval by Messrs. Roberts and Wallace. It would thus seem to include machinery.

"Ways," again, means the roads and passages in and about the business premises or the place where the operations are being carried on; and in point of fact it is not very easy to draw a distinction between what is included in the word "ways" and the word "works"; perhaps "works" is more comprehensive.

In the usual case where an accident has come about through some defect in the condition of the ways, works, machinery, or plant, there is no great difficulty in setting forth what the defect complained of is. Since, however, the passing of the Act questions have been raised as to what constitutes "a defect in the condition" of these so as to enable an action to be founded on this provision of the statute. One of the most important cases in connection with this question is that of *McGiffen v. Palmer's Shipbuilding Company* (Nov. 14, 1882, 10 Q.B.D., 5). In this case a workman was employed in the defendants' ironwork, and part of his duty was to take in iron in balls by means of a two-wheeled car along a roadway of iron plates. While he was so engaged the car struck against a piece of substance used for lining the furnaces, which had been negligently placed, projecting into the roadway, and a ball fell on him, causing

personal injuries from which he died. It was held by Field and Stephen, J.J., that the obstruction caused by the substance projecting into the roadway was not "a defect in the condition of the way" within the meaning of the Employers' Liability Act, 1880, section 1, sub-section 1, and that the defendants were not liable.

Field, J., in that case said:—"Some portion of the way was known as the 'race,' that is, the place on which the bogies run, and that race, it is perfectly plain, ought to be clear, and there the negligence on the part of anybody who has the superintendence and fails to keep that race clear would occur. But are we able to say that there was a defect in the condition of the way? Now, for the purpose of determining that we must look at sub-section 2 and the language of the Act of Parliament; and it seems to me that if Mr. Wills is right it would have been unnecessary to say anything about the negligence of the people employed. It seems to me that the Legislature in using the word 'way' means not a right of way, not the right to walk up and down this place, but it means a thing—something which is the property of the employer, which it is his duty to find and use, or which he does in any way use in the business. Either the word 'way' means a material thing which may be used within or used in connection with the business of the employer. . . . I cannot help thinking, therefore, that the construction to be put upon section 1 is that the defect must be something in the permanent or quasi-permanent condition."

In explanation of this last sentence, it was admitted that the words "a defect *in the condition of the ways*"



was a wider phrase than a "defect in the ways"; but, as we have seen, Mr. Justice Field held that must mean a defect in the permanent or quasi-permanent condition of the ways. Mr. Justice Stephen concurred.

There is a recent case in the Second Division, *Mitchell v. Coats Iron and Steel Company* (November 6, 1885, 23 S.L.R., 108), not reported in *Rettie*, which rather seems to be an authority to a contrary effect. In this case a brakesman on a locomotive engine, which was used for the purpose of drawing out waggons in an ironwork, was ordered by the engine-driver, whose orders he was bound to obey, to get off the engine while it was in motion, and replace on the rails one of the waggons, the wheels of which had slipped from the line. In course of obeying the order the brakesman had stepped on to the footboard of the engine in order to get off it, when one of his feet was struck and severely injured by a bar of iron projecting so as to overlap the footboard from a heap of puddled iron bars, which were, according to the custom of the works, laid down near the rails waiting for removal to another part of the works. The case was brought in the Airdrie Sheriff Court.

The Sheriff-Substitute (Mair) found for the defenders, but Sheriff Clark reversed, finding "that the allowing of a bar of iron to lie in such close proximity to the line of rails was a defect in the condition of the ways for which the masters were responsible" under the sub-section I am discussing.

The Judges in the Second Division did not deal with this question in such a way as to make it clear whether they repudiated the views of the Judges in

McGiffen's case or not, but seem to have pronounced a sort of mixed judgment, partly founding on the obstruction placed on the line and partly also on the third sub-section of section 1, with which I will have to deal later on. The interlocutor contained these findings:—"Find that the injuries sustained by pursuer were caused by the fault of the defenders in placing, or allowing to be placed, a bar of iron so near to the line of railway as to come in contact with the pursuer's foot when leaping from an engine belonging to the defenders, in compliance with the order of the driver for whom they were responsible, and whom the pursuer was bound to obey, to adjust a waggon on the line: Finds that the defenders are liable to pursuer in damages accordingly."

A very short opinion was given by the Lord Justice-Clerk, in which Lords Young, Craighill, and Rutherford-Clark are said to have concurred. In that opinion no reference is made to the opinions of the Judges in McGiffen's case. After stating the facts and the view taken by the Sheriff, all that the Lord Justice-Clerk added was:—"In all these cases the line between liability and non-liability is not very clearly defined. We have had difficulty and some difference of opinion in arriving at a decision in the present case. But on the whole matter we are not inclined to disturb the judgment of the Sheriff, and accordingly we will pronounce an interlocutor affirming that judgment." It seems matter for regret that no fuller opinions upon this important point were given for the guidance of Sheriffs, in whose Courts the great bulk of the actions brought under the provisions of the Employers' Liability Act are finally decided; but as Sheriff

Clark's judgment was affirmed, it appears to me that this decision must be held in Scotland to overrule the judgment given in the case of M'Giffen.

Another point of interest in the construction of the words "defect in the condition of the ways," etc., is one which came up in the important case of *Heske v. Samuelson* (12 Q.B.D., 30), viz., whether it constitutes "a defect in the condition" of a machine, if applied to a purpose for which it is unsuited. In this case a workman was killed by a piece of coke falling from a lift used at a blast furnace belonging to the defenders. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent the coke from falling over, or from the platform at which the plaintiff was working not being roofed so as to protect those working on it from falling coke. The County Court Judge held that a defect arising from the original construction of the machine was not a "defect in the condition" of the machinery in the sense of the Employers' Liability Act. Lord Chief-Justice Coleridge, however, said:—"The question is whether the fact that the machine was unfit for the purpose for which it was applied constitutes 'a defect in its condition' within 43 and 44 Vict., c. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the Act." Mr. Justice Stephen concurred.

In the case also of *Cripps v. Judge*, (August 4, 1884, 13 Q.B.D., 583), the same point was argued in the Court of Appeal, consisting of Lord Esher (Master of the Rolls) and Lords-Justices Bowen and Fry. The

Judges unanimously approved and followed Lord Chief-Justice Coleridge's dictum.

There can, I think, be no doubt that the same view would be taken in Scotland. In the case of *Welsh v. Moir*, already referred to (February 4, 1885, 12 R., 590), it was held at common law that the defenders were liable for an accident occasioned by putting a travelling crane to improper use, viz., tearing up sleepers. The action, it may be explained, was not based upon the Employers' Liability Act, because notice in terms of the statute had not been sent. I am not clear that the same judgment would have been arrived at by English common law; but, *a fortiori*, if such doctrine is sound at common law, the terms of this section, I have no doubt, would be held to infer responsibility on the master's part.

In connection with the same question I may refer to the important case of *Weblin v. Ballard* (17 Q.B.D., 122), to which reference has already been made with regard to another matter, and which I will again have to refer to in dealing with the construction of the third sub-section of section 2. In that case the husband of the plaintiff was employed as fireman at defender's brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey engine. This valve was only reached by means of a ladder placed against a lower pipe, but by reason of a bend in the last-mentioned pipe the ladder, though in itself perfect, being without hooks or stays was unsafe for the purpose for which it was used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. It was held

there was a defect in the condition of the plant in the sense of the sub-section with which I am dealing.

In the still more recent case of *Thomas v. Quartermaine* (July 7th, 1886, 17 Q.B.D., 414), the case just referred to was strongly founded on, but without success. This case also arose out of an accident which happened at a brewery. The plaintiff was employed in a cooling room in a brewery. In this room was a boiling vat and a cooling vat, and between them a passage which was only three feet wide. The cooling vat had a rim rising sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded. The County Court Judge held there was liability in respect there was a defect in the condition of the plant in the sense of the sub-section with which I am dealing, but his judgment was reversed in the Q.B.D. Court by Wills and Grantham, J.J. In the course of his judgment Mr. Justice Wills said:—"But I can see no defect in either ways or plant. The way as a passage or gangway was safe enough, and as far as appears wide enough for any legitimate use that it could be put to as a way. There was no defect in the vat as a vessel to hold liquor to be cooled. The defect, if defect there was, was not in the way considered as a way, nor in the vat considered as a vat, but in the proximity of the vat to the place where a piece of board was kept, which piece of board stuck by some accident when required for use. Now, the test whether machinery or plant be defective or not within the meaning of the statute laid down in the



case of *Heske v. Samuelson* (12 Q.B.D., 30), and adopted by the Court of Appeal in *Cripps v. Judge* (13 Q.B.D., 583), was whether the machine was fit or unfit for the purpose for which it was applied. The same test must of course apply to a 'way,' and following that test I am of opinion that there was in this case no defect within the meaning of section 1, sub-section 1 of the statute, and therefore that this case is not brought within the provisions of the Employers' Liability Act, 1880."

Another case which lays down a general principle of importance was decided in the Q.B.D. Court on 5th April last (*Howe v. Mark Finch & Co.*, 17 Q.B.D., 187). It was there held that the word "works" in the first sub-section I am dealing with must be taken to mean works already completed, and not works in course of construction, which are on completion to be connected with or used in the business of the employer. The plaintiff in this case was a plumber in the chemical works of the defendants. A certain wall was in course of construction, being "an external warehouse wall." At the time of the accident the wall had not been completed and had never been used, though it was intended to be used for the business. When the case came to be tried part of the warehouse was an engine-room used for the works and used for storage for ballast. The warehouse itself was not in use at the time of the accident, and no engine was there. The Judges were Mathew and A. L. Smith, J.J. In upholding the nonsuit of the Middlesex County Court Judge, Mr. Justice Mathew said:—"We are constrained to come to the conclusion that the Legislature in saying, 'defects in the condition of the . . . works

....connected with or used in the business of the employer,' did not mean '*about* to be' connected, or '*about* to be' used. I think the defect that it was intended to protect the workman against was a defect in 'the works connected with or used in the business of the employer, carried on by himself,' a defect which the employer might or ought to discover, and the workman ought to have an opportunity of objecting to.

"I do not think section 1, sub-section 1, was intended to apply to a case where machinery, etc., was brought into a place intended to be used and left so insecure that it fell. This is made somewhat clearer by the terms of sub-section 2, and there is a further proviso in section 2 that the workmen shall not be entitled to a remedy under section 1, sub-section 1, 'unless the defect therein mentioned arising from the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the .... works .... were in proper condition.' Here, I think, the person is to be a person entrusted with superintendence of works, etc., 'used in the business,' to go back to the language of sub-section 1. This damage by the fall of a wall in course of erection cannot be spoken of as arising from a defect 'in works' actually occupied or actually used for the purpose of business. We are now assuming negligence of the defendants, and for that there is a clear liability at common law. But with respect to liability under the Act the County Court Judge was right."

Mr. Justice Smith in the course of his opinion, after referring to the terms of the sub-section, went on to say:—"Does that mean partly made ways, etc., which may be made very insecure when in process of con-

struction? No; it means to give him a right of action when the contemplated ways, works, etc., are 'connected with or used in the business,' and are in a defective state by reason of the master not having discovered what he ought to have done. 'Ways' means the ways used in the business, not partly made ways not used. If that be so as to 'ways' it is so as to works."

I doubt exceedingly if so narrow a construction would be adopted in the Scotch Courts. We have already seen that the Judges of the Second Division in the case of *Mitchell v. Coats Iron and Steel Company* (23 S.L.R., 108) took a wider view of the words "defect in the condition of the ways" than the English Court did in the somewhat similar case of *M'Giffin v. Palmer's Shipbuilding Company* (10 Q.B.D., 5). I submit with some confidence, looking to the decision referred to, that the Scotch Courts would be disposed to give a much more liberal construction to the word "connected" in the phrase "connected with the business of the employer." The word "connected," I apprehend, would be interpreted as meaning having something to do with the business of the employer, and the wall which fell in *Howe's* case having been put up for the purpose of the business would, in my opinion, fall within that interpretation.

Another matter which requires to be considered in connection with this sub-section was raised in the case of *Kiddle & Son v. Lovett* (Dec. 12th, 1885, 16 Q.B.D., 605). This case was brought before Mr. Justice Denman, without a jury, for breach of contract. A "boat staging" or suspended platform put up for the plaintiffs by the defender under a contract between

them to enable the plaintiffs to paint the house fell through being insecurely fastened by the defendant and hurt a painter in the employment of the plaintiffs. The painter brought an action under the Employers' Liability Act, founding on this sub-section, which the plaintiffs settled out of court by paying £125, and they then sued the defendant for breach of contract.

Mr. Justice Denman held that the defendant was liable under the contract; but that inasmuch as the plaintiffs had employed a competent contractor to put up the boat staging, and there was on the evidence no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract.

The only passage of this opinion which it is necessary for me to quote is as follows:—"Without laying too much stress on the particulars given in the action in the County Court, I think it clear that the plaintiffs were not upon the facts now proved liable in that action. If their liability is based upon contract, all that it could properly be contended that they contracted with Chalkley (the injured man) to do was to take reasonable and proper care that the boat staging to be provided for the work should be properly and securely fixed. I think it would be unreasonable to hold that it was their duty under such a contract either themselves to inspect such work or to employ anyone specially to inspect it. They had only a day before it was to be used employed a competent contractor to fix it; and I cannot upon the evidence find anything which would justify me as a judge of the

facts in this case to find otherwise than that the plaintiffs did take such reasonable and proper care. There are cases, no doubt, in which a master has been held liable in an action for negligence for not seeing to the condition of plant and machinery which has been erected for a long time and gone to decay, but no such case is suggested here; nor can it be suggested that there was any reason for the plaintiff suspecting that the defendant's workmen would do the work in the manner which caused the injuries to Chalkley, or otherwise than efficiently."

This seems clearly sound. The observations already made as to the extent to which a master can delegate the duty of seeing as to ways, works, machinery, etc., are confirmed by the opinion expressed in this case. What, then, should the remedy have been in this case? It would appear, I think, that the proper course was for the injured painter to have sued Lovett as the master of the wrongdoer, and if so advised, the wrongdoer himself. I say this advisedly, because the accident complained of happened in England; but at common law, had the accident happened in Scotland, the principle given effect to in the cases of Wingate, Woodhead, and Maguire would probably have barred such action except against the actual wrongdoer, and as he was not Lovett's servant no action could have lain under the statute. Therefore, had the accident happened in Scotland it is difficult to say what would have been the remedy if the actual wrongdoer was without means.

Since the above was written, a report of the important case of *Kettlewell v. Paterson & Co.* (25th November, 1886, S.L.R., 24, 95) has been issued. It is practi-



cally to the same effect as *Kiddle v. Lovett*. That case was raised in the Sheriff Court of Lanarkshire before myself. The facts were these:—A working glazier had been supplied by his employer with suitable scaffolding for his work. The employer had a contract to do the glazier work connected with the Glasgow & South-Western Railway goods station. The workman was injured by the scaffolding on which he was standing giving way. On the morning of the accident the pursuer was directed by Ronald, the foreman, or at least a man who was in a superior position, to use a scaffold erected in connection with the painter work, as more convenient for the glazier's purpose. This scaffold gave way through knots in the wood, and the Lord President stated that there was no doubt whatever as to the imperfection of the scaffold. I held there was no negligence on the part of Ronald in respect he was quite justified in believing that a scaffold erected by the foreman joiner for the painters would be safe for the glaziers. Sheriff Clark reversed, holding there was negligence on the part of Ronald in not examining the scaffold personally before permitting his men to go upon it. The Lord President said, after giving reasons for discarding the evidence of the foreman joiner as wholly unsatisfactory:—"Taking the case then on Ronald's evidence it comes to this, the scaffold which was the cause of the accident was erected not for the glaziers but for the painters. It was erected by a competent man, and by one who was in the habit of erecting such structures. Was it a case of negligence then in Ronald to make use of such a scaffold, especially if he was able by using it to do more efficiently his master's work? I cannot say,

in so acting, he was guilty of negligence in the sense of the statute. On the contrary I think that Ronald acted with prudence, and that he was warranted in making use of a scaffold erected by a competent tradesman when, by so making use of it, the work could be more satisfactorily done. I do not consider it necessary for the present decision to consider whether or not it is proved that Ronald might have by a careful examination discovered the existence of the flaws in this 'needle.'"

Lord Shand in the course of his judgment said:—"I do not see that anything like a case of negligence has been made out against Ronald, as it is not suggested that the defects which it now appears existed in this 'needle' could be observed from below, and I cannot see that he was in any way called upon to mount this scaffold and make a close examination of the wood of which it was constructed."

The First Division accordingly unanimously reverted to the decision of the Sheriff-Substitute.

The same section had to be construed in the case of *Pegram v. Dixon*, 9th July, 1886 (55 L.J.Q.B., 447, also *Times Law Reports*, II., 801). This case was before the same Judges, Wills and Grantham, J.J., as disposed of the appeal in *Thomas v. Quartermaine*. It was an appeal from the Marylebone County Court Judge, who had awarded £50 to the plaintiff. The defendant was a builder, and the plaintiff was working in his employment in the building of a house at Finchley. During the building the workmen obtained access to the upper part of the house by ladders placed in the well intended for the staircase. There was another well throughout the height of the house intended for a lift,

and this was used during the building for throwing rubbish down. While the staircase was being fixed the ladders used by the workpeople were transferred to this second well. The plaintiff was in the act of ascending one of these ladders when a boy on the third floor threw down a plank, which struck the plaintiff and caused the injuries complained of. Immediately before the accident the boy had been warned not to throw down the planks, but no general notice to the workpeople had been given to desist from throwing things down the well when the ladders were placed there. In reversing the judgment of the County Court Mr. Justice Wills said it would be a "preposterous abuse of language to hold that a mere negligent act of a fellow-servant could be called a defect in the condition of a way."

A question which has not, I think, come up in any reported Scotch case, or indeed in any English case since the passing of the Employers' Liability Act, is whether insufficiency of light is a thing which would be held to constitute a defect in the condition of the ways, etc. Messrs. Roberts and Wallace say that a great deal can be said on both sides of this question. I do not think it necessary to say anything here except that the question is an open one.

I do not intend to enter into further detail in connection with the first sub-section except adverting to the effect of the third sub-section of section 2 as affecting the defences of known danger and accepting the risk as incident to the employment. I previously pointed out as in my opinion a reasonable explanation of the use of the words "of the employer" in sub-section 1 of section 2, viz., that these words, read in

connection with this third sub-section, barred the employers from pleading that the workman was working in face of a known danger if the master knew of the defect which brought about the accident ; at all events where the workman was aware that the master was in the knowledge of such defect.

It is desirable to quote here the words again. “ A workman shall not be entitled under this Act to any right of compensation or remedy against the employer ” (First words of section 2). *In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence* (Sub-section 3, section 2).

It is to be observed that the intimation contemplated is either of some material defect in the condition of the ways, etc., or of negligence on the part of some one or other for whom the master would be responsible under the Act. If the workman knows of the defect or negligence which subsequently brings about an accident to himself, and keeps that information to himself, he is by this provision barred from recovering unless he was aware that the master, or a superior for whom the master is responsible, was in the knowledge of the defect or negligence which ultimately led to injury. Supposing, for instance, the workman knew and the master did not know that a foreman entrusted with responsible duties was in the habit of coming drunk to the works, and the workman did not give information, and if the workman consequently sus-

tained injury through the foreman's incapacity through drink, it appears to me that in such a case the workman's remedy would be barred; but if he gave such information, and the master retained the foreman in spite of this knowledge, I imagine that not under the Act alone, but at common law, there would be liability, because such a habit would be fatal to competency.

If the workman once gives information to the master or to a superior of a defect or negligence which subsequently causes injury, it appears to me that no lapse of time can free the master from responsibility. I find myself unable to agree with the opinion set forth by Messrs. Roberts and Wallace, p. 307:—"If a workman, after giving information, remained in the service for a length of time knowing the risk, and that no steps had been taken to prevent its continuance, or if, being aware of a defect in the plant, etc., and of the employer's or a superior servant's knowledge of it, he voluntarily makes use of the plant, there is nothing in the sub-section to prevent his employer in saying that the workman has assented to the disregard of his complaint, or the existence of the defect and the risk involved. So, also, there may be a similar assent to the negligence of a foreman, etc., notwithstanding the complaint made."

For this expression of opinion no authority is quoted. It appears to me that the fair and reasonable meaning of this sub-section is that wherever the master or superior knows of defect or negligence which brings about an accident, and the workman is able to show that he knew that the master or superior was aware of the defect or negligence, the master shall not



be able to escape liability by pleading that the injured man assented to the risk as one incident to the employment. "There is nothing," say Messrs. Roberts and Wallace, "in the sub-section to prevent his employer from saying that the workman has assented to the disregard of his complaint or the existence of the defect and the risk involved." But the words "unless he was aware that the employer or such superior already knew of the defect" seem to me plainly to mean that the workman in no case shall be barred from recovering upon the ground of defect or negligence being known to him if he can prove that he knew the master or superior was aware of it also. I submit that any other construction would practically lead to confusion.

"If," say Messrs. Roberts and Wallace, "a workman after giving information remain in the service for a *length of time*, etc., knowing the risk." What length of time, it may be asked, is to permit the defence of "accepting risk as incident to the employment" to be reared up? Is a week to have this effect, or a month, or a year? If the English authors are right in their contention, there must be a *punctum temporis* (period of time) at which the risk must be held to be accepted. It seems to me impossible to affirm that under this sub-section any definite line is drawn; and, therefore, I submit that by its terms, generally speaking, where the workman is in the knowledge that the master or superior is in the knowledge of the defect or negligence which brings about the accident, the master's lips are closed as to the plea of the workman having "worked on in the face of a known danger, or accepted a risk as one incident to the employment." I submit

further, that this construction is one which commends itself to justice and common sense.

Since writing the above sentences the report of *Weblin v. Ballard* (17 Q.B.D., 122) has been issued. It supports the view indicated above. In that case, as we have seen, there was held to be a defect in the ways. The County Court Judge in that case held "*that although the deceased knew of the defect he was excused from informing the defendant of it, because he (the deceased) was aware that the defendant knew of it.*" A. L. Smith, J., dealing with this matter said:—"Lastly, it was argued that the statutory defence under section 2, sub-section 3, was made out because it had not been shown that the deceased was aware that the employer knew of the defect, and that therefore the deceased was not excused from giving the information required by that sub-section. All we can say upon this is that there was evidence—which the learned County Court Judge could, if he had been so minded, found—that the plaintiff was aware that the defendant knew of the defect. He has so found, and we cannot for the reason above given interfere with that finding."\*

I have only to add, it is to be noted that the point is not *whether the master or the superior knew of the defect*, but *whether the workman was aware that the master or the superior was in the knowledge of the defect*. Even were the master aware, if the workman was in the knowledge of the defect, and failed to give information, and was unable to show that he knew of the master's knowledge, the master would

\* See also the earlier portion of the judgment quoted, pp. 126-8, as an exposition of the effect of the Act on the master's defences.

have a good plea in defence under this third sub-section.

I now come to what possibly is the most important clause in the whole Act—viz., the second sub-section of section 1. By that clause the master is made responsible for personal injury caused to a workman “*by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence.*” This clause has to be read in connection with the third sub-section of section 2, the effect of which has, however, already been referred to by me, and also it has to be read in connection with the following definition in section 8 of the Act:—The expression “*person who has superintendence entrusted to him means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour.*”

The effect of this clause is to make the master liable to the statutory extent for the fault of a foreman or manager. Subsequent to the Bartonshill case, and till the judgment in *Wilson v. Merry*, it was still assumed, as we have previously seen, that a foreman or manager was not to be regarded as a fellow-workman. But *Wilson v. Merry* settled the law of Great Britain to be that the fault of such person was to be held that of a collaborateur. Now the Act affirms what the Scotch Judges up to the date of *Wilson v. Merry* held to be merely common law. We will have to consider two points in connection with this clause—1, *Who is a superintendent in the sense of the Act*; and, 2, *What is to be accounted as falling under the words ‘whilst in the*

*exercise of such superintendence.'*" These I will take up in their order, premising what has been previously pointed out and defined—that to infer liability such superintendent must be held to be guilty of what in law amounts to *negligence*, and the workman must not have wilfully concealed from the master knowledge of incapacity or negligence on the part of such person of which the master was not aware. The third subsection of section 2 equally applies to the concealment of incapacity or negligence on the part of some superior workman as to the concealment of some defect in the ways, plant, etc.

1. *Who is a superintendent in the sense of the Act?* At the outset this preliminary question falls to be considered, viz., Whether the superintendence contemplated is wholly over persons, or is equally a superintendence over things, *e.g.*, as over certain portions of machinery. Messrs. Roberts and Wallace refer with regard to this point to the case of *Cairney v. Nicol*, reported apparently only in the *Law Times* newspaper, November 24, 1883. I am not aware of any reported Scotch case in the Supreme Court in which this point has been brought up.

I gather from the report of the authors referred to that the following was the state of matters disclosed in the case of *Cairney*:—A man had been killed through the falling of a certain wall. The jury found that this was due to the negligence of a man of the name of Todd, who, as clerk of the works, had been employed by the defendants, who were millowners, to superintend certain structural alterations. The question, after the jury had given a verdict for the plaintiff, was reserved as to whether Todd could be

held to be a superintendent in the sense of the clause I am dealing with. Mr. Justice Denman afterwards gave judgment for the plaintiff, holding that "this provision covers a case where injury happens to a workman through the negligence of a person entrusted with superintendence, even though such superintendence be in another department of the business."

The same Judge gave a further illustration of what would, in his opinion, infer liability:—"Suppose there was a factory, and that the person injured was one whose duty it was every day to go to the factory and put the bales into carts, and suppose that the stables of the factory were totally removed from the other departments, and that the foreman of the stables negligently and improperly caused a furious horse to be put into a cart, the words of the Act would cover an injury caused by such negligence."

Messrs. Roberts and Wallace quote with approval the definition of "superintend" in Webster's, Ogilvie's, and Latham's Dictionaries, "to oversee with the power of authority"; "to take care of others with authority." Accordingly, although a man is entrusted with the control of a particular piece of machinery, such authority would not, I take it, be superintendence in the sense of the Act.

A point which has come up more than once in the Sheriff Court of Lanarkshire is as to whether a fireman in a pit is to be regarded as a person having superintendence in the sense of the second sub-section I am dealing with. One of these cases is that of *Paterson v. Hamilton, M'Culloch & Company*, which was raised in the Hamilton Sheriff Court. It was held by both Sheriffs that the accident had happened



through the fault or negligence of a fireman in the defenders' employment. Sheriff Birnie, however, held that a fireman was not a person who could be regarded as a superintendent in the sense of the Act, but Sheriff Clark took a different view.

It may be interesting to give extracts from the judgments of both Sheriffs. Sheriff Birnie said:—"But the question remains if the defenders are liable for M'Farlane's fault. It is not doubtful that prior to the Act they would not have been so, as the pursuer and he were collaborateurs. But by the first section of that Act masters are liable to their servants for injury caused by reason (he then quotes sub-section 2 and sub-section 3 of the first section of the Act). It seems to me, although not without doubt in the second branch, that M'Farlane had not superintendence, and was not a person to whose orders or directions the pursuer was bound to conform and did conform in redding the fall. A person 'who has superintendence,' which must be held to mean who has *any* superintendence, is defined in the eighth section to be 'a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour'; in other words, a manager or agent, not a workman, having a certain superintendence over persons or machinery, but ordinarily engaged in manual labour."

Sheriff Clark said:—"The fireman in a colliery like that in question is the competent person appointed in terms of the Mines Regulation Act, 1872. His duties are formulated in sections 33 to 41 inclusive of the regulations of the mine. From these it will be seen that his duties are of the most important descrip-

tion. Not only has he superintendence of the ways and works in all that concerns ventilation and the prevention of noxious gases, but he can, and is bound to give such directions to the miners and other workmen as the circumstances may require. His duties are in some senses more important than those of the manager and oversman, for on his vigilance and the report he makes they very much depend, and are guided in arranging how the mine is to be worked and how the miners are to be employed. To discharge his duties aright obviously requires his whole time and attention to that subject. If he were to be employed in addition as a miner or ordinary workman, or indeed had anything else to do, he could not be described as a person fitted to discharge the duties of fireman in a competent manner. It was strongly contended that he does not come under the description of a person with superintendence entrusted to him, because he is sometimes engaged in manual labour. But it is plain what the statute means by this phrase is not such physical exertion as is inseparable from the due execution of his duties as fireman. If this were so, then the mining engineer who used hammers or other tools to make the necessary examination to enable him to fulfil his functions would also be a manual labourer. What is obviously meant is that the phrase 'a person having superintendence.' shall not include those whose ordinary occupation is that of an operative miner or collier, though, in addition to such manual labour, he may undertake a certain degree of superintendence. In the present case it is not proved that the defenders' fireman was charged with any other duties than those of the important

office in which he was engaged. If, indeed, it could be proved that the defenders were utilizing the fireman for other purposes, it would go far to show that they were setting at naught the requirements of the Legislature, and this in itself would involve them in very serious liability."

With reference to these remarks of Sheriff Clark, I may note that very often in Lanarkshire the duties of fireman and roadsman are combined. A fireman's duty is, generally speaking, to see that the working places are free from gas, and not to allow the miners to work where there is any risk of gas accumulating in dangerous quantities. The roadsman's duty, on the other hand, is to see that the roads are kept in a safe state, and so far as this is discernible to do the same as regards the roofs. A roadsman's work, of course, does involve manual labour; where, therefore, an accident happens through the fault of a roadsman he cannot be held to be a superintendent, so as to infer liability under the second sub-section; and where such a combination of duties as those of roadsman and fireman are discharged by one individual, that individual, it would seem, could not be held to be a superintendent in the sense of the sub-section on account of the manual labour involved. If, however, the Mines Regulation Act contemplates, as Sheriff Clark seems to think, that no other duties except those of fireman shall be put upon the individual who holds that post, there might be liability on the masters on the ground given effect to in the case of *Murdoch v. M'Kinnon*, previously referred to, that the masters had failed in duty in not seeing as to the appointment of officials essential to the safety of the pit.

It may further be remarked that the definition previously given of the words "to superintend" seems inconsistent with the theory that a fireman falls under that category, inasmuch as there is wanting from his so-called superintendence "the power of authority." Sheriff Clark's interlocutor in Paterson's case was issued in November, 1884. The case of *Wingate v. Monkland Iron Company* (12 R., p. 91) was decided in the same month. In the case of *Goodwin v. Walkinshaw Oil Company* (The Scottish Law Review, I., 320) I incidentally required to refer to the same question as that dealt with in Paterson's case. After referring to the conflicting views of the Sheriff and Sheriff-Substitute in Paterson's case, I went on to say:—"I would of course have considered myself bound by this decision (Sheriff Clark's judgment) had it not been for the recent important case of *Wingate v. Monkland Iron Company*, where the Second Division unanimously held that the apprentice of a mining engineer, who had gone down a certain pit for the purpose of making plans of the workings, was precluded from recovering damages on the ground that the risk was one incident to the employment, the cause of the accident being admittedly the fault of the fireman. Now it is quite open to argument that that case does not rule, because it might be said that the Employers' Liability Act was wholly inapplicable to the case of any person between whom and those against whom the action was brought the relation of master and servant did not subsist, and that therefore, while the plea of risk incident to the employment cut out any claim at common law, so also no claim under the Employers' Liability Act could lie

at the instance of one who was not in the position of a servant. That may be true, but at the same time it seems to me hardly possible that the distinction should not have been carefully drawn by the Judges in the case unless it had been assumed that employers were not responsible under the Employers' Liability Act for the acts or omissions of a fireman. My own view is that under the Employers' Liability Act masters are not responsible for firemen on the ground that they are persons with superintendence entrusted to them. It may be, however, that where personal injury is caused to a workman 'by reason of any defect in the condition of the ways, works, machinery, or plant' of the employer, and this defect has not been discovered or remedied owing to the negligence of the fireman, the employers under sub-section 1 of section 1, and sub-section 1 of section 2, may be responsible."

This case, as has already been incidentally mentioned, was appealed to the Court of Session, but, unfortunately, for some unknown reason, has not been reported, although, as it seems to me, points of very considerable importance were involved, so that it does not appear whether the point I am referring to was touched in any way in the Court of Appeal.

It was argued before me that a man in charge of a stationary engine at a pit, through whose fault an accident happened, was a person entrusted with superintendence (*M'Grorty v. Dixon, Limited*). I said in the note to the interlocutor:—"Accordingly the sole question for determination is whether or not the defenders, under the Employers' Liability Act, are responsible for the fault of an engineman. By the fifth sub-section of section 1 of the Act referred to



the employers are liable where an accident has happened by reason of the negligence of any person in the service of the employer 'who has the charge or the control of any signal, points, locomotive engine, or train upon a railway.' It may be there is no valid ground for distinction between liability in the case of a driver of a locomotive engine and the engineman in charge of a stationary engine; but at all events the fact of this fifth sub-section being made so distinctly applicable only to the case of drivers of locomotive engines pretty clearly indicates that it was not the intention of the Act to make masters responsible for the faults of their enginemen. The clauses upon which pursuer's agent founded are the second and third sub-sections of section 1. . . . It does not appear to me that it is open to argument that O'Neil falls under the definition of persons under this second sub-section, because I think it is clear—(1) that he had no superintendence entrusted to him in the sense of the Act; and (2) his occupation was such that he was necessarily ordinarily engaged in manual labour."

The case was appealed to Sheriff Clark, but this point was not dealt with by him, as he took the view that pursuer's injuries were of too slight a description "to warrant his claim for reparation against the defenders, even if their fault was established."

It has also been advanced in argument to me, though not where the direct question was involved, that a pit owner was liable for a pitheadman's negligence, as being a person with superintendence entrusted to him in the sense of the Act. The view that I take is that already expressed by Sheriff Birnie, that the fair meaning of these words is to be found in

a construction which establishes the position of such a person as a manager or agent. A pitheadman has not the "power of authority" already referred to as essential. He must be some person who from his position can fairly be regarded as the master's delegate. That construction is, I think, borne out by the terms of the third sub-section, because it is provided there that the masters will be responsible for the negligence of persons in an inferior grade to superintendents in certain specified circumstances. We shall shortly hereafter see what these special circumstances are, but in the meantime the terms of this third sub-section would seem to show that superintendence is not a thing to be predicated from the difference of grade in workmen. To be a superintendent requires that that individual's duty must be solely or principally that of superintendence, and he must not be ordinarily engaged in manual labour.

In connection with these points reference may be made to the important case of *Shaffers v. The General Steam Navigation Company* (14th February, 1883, 10 Q.B.D., 356). In this case the facts are thus stated in the rubric:—"The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy rope, and to give directions when to lower and to hoist the chain. He neglected to use the guy rope, and the sacks in consequence fell down the hatchway and hurt the plaintiff, who was working in the hold. Manisty and Mathew, J.J., agreed in holding that Jones was engaged in manual labour; that he was not a person having superintendence entrusted to him, and that the

accident was not caused by his negligence while in the exercise of such superintendence." In commenting upon this judgment Messrs. Roberts and Wallace say:—"It is submitted that even if Jones had had no duty to perform involving manual labour the result would have been the same, inasmuch as his position was in reality purely immaterial and subordinate, giving him no authority over those engaged in it; although he might be said to be superintending the working of the crane." In other words, in his position there was a want of the "power of authority" which, as previously explained, seems necessary in order to bring an individual under the category of "who has any superintendence entrusted to him." See, however, in connection with the point the case of *Sweeney v. M'Gillvray* (Nov. 23, 1886, 24 S.L.R., 91), referred to *infra*.

(2) *What is to be accounted as falling under the words "whilst in the exercise of such superintendence"?* The negligence on the part of the superintendent which brings about the accident must, to infer liability on the part of the master, be negligence whilst in the exercise of such superintendence. This does not mean that when the accident happens the superintendent must be in the act of superintendence. If the negligence is negligence while he was superintending, then the master is responsible. The superintendent may have left the master's employment, but before he left the employment may have been guilty of some act of negligence which ultimately brought about death or injury, and for that the master is on the theory of the statute fairly responsible. Messrs. Roberts and Wallace say:—"It is submitted, however, that to give proper

effect to the words in sub-section 2, the negligence complained of must occur not only during the superintendence, but substantially in the exercise of it; and that the employer will not be responsible for an act unconnected with the duty of superintendence."

I confess I am doubtful if a Scotch Court would be inclined to draw this fine distinction. Reference has already been made to the case of *M'Manus v. Hay* (12 R., 425). In that case, no doubt, the theory advanced as to liability was based rather on the third sub-section than upon the second. What happened was that a man in a superior grade, of the name of Johnston, ordered the pursuer and three other men to assist in removing a steam engine, and an accident happened through Johnston, who was assisting the men, letting go his hold of the engine with the object of placing a brick under it. The pursuer got himself seriously injured in consequence of this act of Johnston's, but the Court held that Johnston had not been guilty of negligence, and that the accident must be held to be due to misadventure. Supposing Johnston had been a person in the position of a superintendent, but had voluntarily lent a hand in the job, and what took place was held to amount to negligence, I can hardly imagine that a Scottish Court of Law would have been inclined in such circumstances to take the view that Johnston's act fell to be disassociated from his superintendence.

The English case, moreover, of *Osborne v. Jackson* (1st May, 1883, 11 Q.B.D., 619) goes to support the view which I have indicated. In that case the material facts were as follows:—The plaintiff, a brick-layer in the employment of defendants, was at work

near a shoring while a scaffolding was being taken down by the other workmen. Thomas, the defendants' foreman, himself handed a scaffold plank to Collier, a labourer, and called to him to take it. Collier took the end of it, but was so far off that he could not hold the plank, and the foreman letting his end go, the plank slipped and knocked down the shoring, which fell upon the plaintiff and hurt him. Thomas, in explanation of how he came to be where he was, said:—"I was acting as superintendent, and went up to assist and see the men did not do any harm to the others. I thought it my duty to do so." The County Court Judge held that there was negligence on the part of a superintendent in the sense of the Act, and the case was appealed to the Queen's Bench Division.

It was argued by Mr. Ruegg that the negligence of Thomas was in doing manual labour and not in superintendence, and he was acting in place of and as a workman only, and Mr. Ruegg founded on the case of *Shaffers*. The Judges, however, refused to interfere with the ruling of the County Court Judge. Mr. Justice Denman said:—"The decision in *Shaffers v. General Steam Navigation Company* was on grounds which do not apply here. The negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident. In the present case the foreman was generally superintending the work on which the plaintiff and Collier were employed. The foreman called to Collier, who was under his orders, to take the plank when it was impossible to do so safely; that was superintendence; and the Judge might find, and has found, that it was negligence within the meaning of sub-section 2. I think



it was so, although Thomas was at the time supplying as a volunteer the place of another workman." In this judgment Mr. Justice Hawkins concurred.

It appears to me that a liberal construction of the words "whilst in the exercise of such superintendence" should be given. I imagine these words were inserted to meet some such case as this. A foreman in one department goes into another department, and with the assent of the men working under the foreman of the latter department gives as a volunteer manual assistance, and an accident happens through his negligence. In such a case the master would not be liable, because the person in fault was not in the act of superintendence, and was in no other position to the injured workman than that of fellow-labourer.

Since writing the above the case of *Sweeney v. M'Gilvray* (November 23, 1886, 24 S.L.R., 91) initiated before myself, was decided by the Second Division of the Court of Session. One of the points which came up in that case was as to the construction of the words "whilst in the exercise of such superintendence" in connection with the manual act of a foreman. The accident in question happened through the foreman of the defender negligently pushing a tram-car against the pursuer, who was a servant of the defender. It was strongly argued that "the injury, assuming fault on the part of Gillies (the foreman)" to exist, was not one for which the defender was bound to make reparation under the Act, as it did not result from conforming to an order of the foreman, but from a fault committed by the foreman in his capacity of labourer. No injury "resulted from the pursuer having conformed" to a negligent order; for the fault, if any, was not in giving

the order, but in making a blunder in pushing a car, a mere piece of labouring work."

But this argument the Court, in the opinions given, seem to have wholly disregarded. The Lord Justice Clerk was the only Judge who referred to it, and his statement with reference to this matter is simply to the effect that if Gillies was not a foreman, in the sense of the second sub-section, he was a person to whose orders the pursuer was bound to conform in the sense of the third sub-section. This case goes to confirm the views expressed above as to Scotch Courts declining to draw a distinction between the act of superintendence itself and the manual act of a superintendent while acting as superintendent. In other words, if the injury comes about through the fault of the superintendent, and in connection with some act which might equally well have been done by a fellow-workman, the master will be liable.

As we have seen, Messrs. Roberts and Wallace (pp. 265, 266) say:—"The negligence complained of must occur not only during the superintendence but substantially in the exercise of it, and that the employer will not be responsible for an act unconnected with the duty of superintendence."

In the same case *Sweeney v. M'Gilvray* (24 S.L.R., 91) an important question came up connected with the doctrine thus enunciated. We have seen that Scotch Courts, at all events, will not draw distinctions between negligent superintendence and the negligent act of a superintendent; but I held in the case referred to that the superintendent was acting outwith the scope of his employment, and that this being so he was not in the exercise of superintendence. The facts of that case are

as follows:—A plasterer entered into a contract with the Glasgow Tramway Company to lay certain premises with concrete. It was the duty of the Tramway Company to remove the cars which were in these premises during the night, in order to allow the work under the contract to begin at seven o'clock in the morning; they failed to do this, and the foreman of the labourers in the plasterer's employment said to the workmen under him that they had better attend ten minutes before seven for the purpose of clearing away the cars. The men had done this for about a fortnight previous to the occurrence of the accident. By a negligent act of the foreman in running out the cars the pursuer was injured. The men were only paid by the plasterer as from seven o'clock. The foreman knew perfectly well that it was no part of his duty, or of the men under him, to remove the cars. I held in these circumstances that there was no liability under the second sub-section, because the order given was not one within the scope of the foreman's authority to give, and therefore could not be held to be in the exercise of superintendence.

As regards the third sub-section, I said:—"Again, as regards the third sub-section, it follows from what I have said that, supposing an order had been given by Gillies to the men to run out the cars, this was not a lawful order in the sense that there would have been any breach of duty to the employer in the pursuer or any of the other workmen in refusing to obey it. Messrs Roberts and Wallace say at p. 269 :—' The order or directions are to be orders to which the workman at the time of the injury was bound to conform, that is to say, not only in the relative position must the negli-

gent person and the injured man be such that the latter owes obedience to the former, but the order in question must also be such that the workman could not decline to comply with it without committing a breach of duty to the employer. In other words, the order must be one which it was within the scope of the superior's authority to deliver, or the employer will not be liable.' This very well expresses my own view of the construction of this third sub-section, and that if the order given by Gillies was outwith the scope of his authority under this third sub-section it appears to me there can be no liability."

With these views Lord Craighill agreed, but the Lord Justice-Clerk and Lords Young and Rutherford-Clark held that there was liability for the reasons that the accident happened through the fault of Gillies; that the pursuer was entitled to believe that the orders given by Gillies were lawful orders; that if Gillies was not acting as superintendent the master would be answerable at common law for allowing the men to run out the cars for weeks without taking precautions to see that the operations were conducted safely.

I do not read the judgment to the effect that if the orders given are known to the workmen to be unlawful orders, the master would be liable for an accident happening while the workman was carrying out such orders. Lord Craighill, it is true, said that the pursuer must have known that he was not doing defender's work. "The pursuer was aware of his own contract with his employer. It was for a certain length of day, beginning at seven o'clock in the morning, and not before seven. The pursuer must have known the

master could not have insisted on his working before seven. I think then the pursuer knew that he was not doing the defender's work." The other Judges were not, however, prepared to hold this as a matter of fact.

We have seen that the master is liable, generally speaking, for the fault of a person who fairly falls to be regarded as the master's delegate, acting with a "power of authority" patently received from the master; but the Legislature determined to go somewhat further in making the master responsible in certain circumstances for the fault of persons who could not properly be regarded as superintendents in the sense of the statute, but who were entrusted with a certain power of control. Thus in the third sub-section of section 1 it is enacted that the master shall be liable where an accident happens "*by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed.*"

It is to be noted in this sub-section, as in the two preceding sub-sections, there must be some *negligence*, which has already been defined, on the part of the superior workman. The most important case, I think, which has emerged since the passing of the Act in connection with the construction of and effect to be given to the clause under discussion is that of *Dolan v. Anderson & Lyall* (March 7, 1885, 12 R., 804). The facts of that case were as follows:—A riveting machine-man (M'Avanue by name) was engaged at a riveting job at a furnace along with the pursuer and two



other workmen. He was entitled to give directions to the pursuer and the others, but he could only enforce his orders by an appeal to the foreman of the works. M'Avanue was paid wages at a higher rate than the three other workmen were. This M'Avanue, it appeared, told the pursuer to enter the furnace at which they were working to do some work inside it, the furnace being raised off the ground to admit the pursuer. When the pursuer had completed the work necessary inside M'Avanue gave a signal for the furnace to be again raised, and the pursuer, without receiving an express direction to do so, began to come out, but as he was coming out the chain by means of which the furnace was suspended broke, and the furnace fell on his foot and injured it. It was conceded that this chain was insufficient for the work, and that it had been negligently chosen by M'Avanue. It was also admitted that wooden blocks should have been placed below the furnace when raised to make it more secure. Pursuer's wages were 17s. per week; M'Avanue's 28s. per week. There was conflicting evidence as to the amount of control which M'Avanue was entitled to exercise over the workmen, but on this matter of fact the Second Division of the Court of Session seems to have adopted the statement of pursuer as substantially true. The pursuer said, "I had to do what M'Avanue told me. He was the gaffer over me. I heard him give orders to the other men. He was in full charge of the men. I never gave M'Avanue any orders. He told me what to do, and I did it. If I had not done what he told me he would have got me sent from the job." M'Avanue's own statement was as follows:—"I had charge of the riveting machine. I

had labourers under me, perhaps six or eight, or perhaps three at a time. There were just three on the morning of the accident. These labourers are supposed to do what I tell them. If they do not, I have just to go to the foreman and get others in their places. I instructed the pursuer to go into the furnace. That was his work."

The action was raised in the Sheriff Court of Lanarkshire, and both Sheriff-Substitute and Sheriff took the view that the section of the Act I am dealing with did not apply, but the Judges of the Second Division unanimously held otherwise, the Lord Justice-Clerk, however, being absent. Lord Craighill gave the leading opinion, and as the following passage puts in a very clear light the general effect of the clause I am dealing with, it appears to me desirable to quote it, although of some length:—"The weight of evidence appears to me to be in favour of the view that M'Avanue was a person to whose orders or directions the pursuer at the time of the injury was bound to conform; that he was the head of a squad, that he gave orders or directions to the other members, that the exercise of this authority never was challenged till after the accident, and that, on the contrary, the orders or directions he gave were obeyed by those to whom they were addressed, are things which are clearly established. There is thus real evidence which supports the testimony of the witnesses for the pursuer on the point under consideration, and renders improbable the accuracy of that which has been given by those examined for the defenders. The gist of what is told us by the latter consists, indeed, rather of theory than of facts. They think that M'Avanue could not give orders which

others were bound to obey, because he himself was under authority; and that those to whom he was subject—the general foreman or superintendent of the works—were the only persons to whose orders or directions the pursuer and others like him were bound to conform. But the subordination of M'Avanue to those who were over him is not inconsistent with his power to give orders or directions to those who were under him. Forgetfulness of this is, I think, an explanation of discrepancies in the evidence on this part of the case. The defenders, however, in their argument on appeal, have contended that, even if orders or directions might be and were given by M'Avanue to those working under him, he was not in such a position of trust and responsibility as the person whose orders are covered by sub-section 3 of section 1 of the statute must necessarily occupy. *I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position, he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute are satisfied, and a limitation of their operation for the purpose of restricting the benefit the statute was intended to confer would be not an interpretation of the words of the clause, but a capricious interference with its application."*

I have italicised the latter words of the above passage as setting forth in a distinct way the most important effect of the clause under consideration. The

same view was taken in the earlier English case of *Millward v. The Midland Railway Company* (December 15, 1884, 14 Q.B.D., 68). "There," as Lord Craig-hill said, "the question was dealt with not as one to be determined by the class of workmen to which the person giving the order belonged, but as one to be determined according to his authority to give orders as established by the evidence."

It is to be specially noticed that liability only follows if there be injury through the workman having conformed to some *order* or *direction* given by a person to whose orders the workman was bound to conform.

A liberal interpretation has been given to the words of the sub-section in this connection. In the case of *Millward* there had been no express order. The rubric bears:—"The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions, and that the carman saw him untie the string and made no objection." Incidentally in the discussion before Day and Mathew, J.J., Mr. Justice Day said:—"Surely the order need not be by express words. The jury might think that an order was implied in the circumstances." When the defendant's counsel said, "It is contended that there must be something amounting to direction to do a specific act, the result of which is the injury," Mr. Justice Mathew then said, "The plaintiff was doing what, according to the evidence, it was the ordinary course of business for him to do in unloading similar goods. Is it necessary, in order that the sub-section may apply, that an order

should be verbally given to a man to do what is the ordinary course of his duty to do every day in the week?" Accordingly, as has already been noted, the judges concurred in holding that there was liability under the provisions of the clause under discussion.

It is to be observed that the orders or directions in order to infer responsibility on the part of the master must be orders or directions to which the injured workman was "bound to conform." If the superior workman gave an order which was outwith the scope of his authority to give, or at least which the workman knew was outwith the scope of his authority, and in consequence of this an accident happened, the master would not be liable. Thus, for instance, suppose the superior workman and the injured workman were engaged together at a job, when a friend of the former came up and asked for some purpose of his own that the superior workman should give him some article or other; and suppose, for the purpose of giving this article, the superior workman gave a negligent order, through which the man to whom he gave the negligent order was injured. Such an order or direction would not be one given in the employer's service, and would not be one in the sense of this clause to which the workman was bound to conform. I am assuming, however, that the injured workman knew the article was wanted for something outwith the master's business.

In the case of *Bunker v. The Midland Railway Company* (47 L.T., 476), referred to by Messrs. Roberts and Wallace, but apparently not reported in the ordinary reports, a boy under 15 years of age, who was a van guard in the defenders' service, went out



alone as a van driver, the rules being, and known to the lad, that no person under 15 should go out and drive a van. A foreman of the defenders, in consequence of a scarcity of drivers, had ordered the boy to go out and drive a van to Billingsgate Market. The lad, according to the English rule, suing by his next friend, brought an action against the defenders on account of his being thrown from the van and injured, founding upon the sub-section under discussion. The Judge of the City of London Court non-suited the plaintiff, and the Queen's Bench Division supported his judgment on the ground that the plaintiff was only bound to obey all lawful orders of the foreman, and that he was in the knowledge that the order given was not a lawful order. (See, however, the recent case of *Sweeney v. M'Gilvray* (24 S.L.R., 91), and statement of the case and grounds of judgment, *antea*, p. 230. This case is an important one in the construction of this sub-section, but it had also to be dealt with with reference to the second sub-section, and I do not consider it necessary to advert to it in greater detail here.)

In connection with this question, the Scotch case of *M'Monagle v. Baird & Co.* (9 R., 364) should also be referred to. In that case, however, I take it that it was the second sub-section which was chiefly relied on, but there the Second Division, affirming a judgment in the Sheriff Court of Lanarkshire, held the employers liable for a negligent order, although the injured workman knew, or ought to have known, that his compliance with the order given was in violation of the special rules of the pit.

A question of some importance in connection with this sub-section is referred to by Messrs. Roberts and

Wallace, p. 279 :—"The sub-section applying, as we have seen, to negligence in relation to the operations carried on, as well as to negligent orders, it is easy to suppose cases in which great difficulty may arise when a considerable duration of time has elapsed between the giving of the order and the negligent act or omission on the part of the person who gave the order, to which the workman at the time of the injury was conforming." They then proceed to give an illustration of their meaning :—"A, who is ordinarily engaged in manual labour, is placed temporarily in charge of a hand crane with B under his orders. Whilst A is engaged by himself in raising a heavy weight he stops and calls to B to take the handle. B comes forward to do so, but before he can grasp the handle A negligently lets it go, and it revolves with great rapidity and breaks B's arm. In this case B's injury is, of course, clearly caused by the negligence of A, and it is thought that it may fairly also be said to result from his having conformed to A's orders; here, therefore, the sub-section would apply. Let us now, however, suppose that A has called B to come to the crane, and that B having done so, A instructs him to continue working at the crane and then leaves the spot. After several hours A returns and negligently drives a horse and cart against B, who is still working at the crane. In this case it is clear that if B had not been working at the crane he would not have been injured by A's negligence; and yet it can scarcely be said that his injury resulted from his having conformed to A's orders."

The learned authors referred to then proceed to draw a suggested distinction :—"The distinction between those two cases is, it seems, to be found in

the fact that in the former A, at the time of the injury, is engaged in carrying out the operation initiated by his order, while in the latter his act has no connection with the order, and he has reverted to his normal condition of fellow-labourer. This view is in accordance with the general policy of the Act, which is to render the employer responsible to his servants for the negligence of such of their number as he has entrusted with authority over them. It is submitted, therefore, that the question in such cases as these would be—Did the negligent act form part of the operation in which the injured man was engaged jointly with the other in pursuance of his order? If not, then the sub-section will not be applicable to the case.”

The distinction is clearly drawn and well put. At the same time, I am inclined to believe, judging from the tenor of recent decisions in the Second Division, that a broader and more liberal interpretation in favour of the workman would be given in Scotland to the sub-section I am dealing with in connection with the point under discussion. I am disposed to think that if the following questions were answered in the affirmative liability would be held as against the master:—(1) Was injury sustained in consequence of the workman having conformed to the order of a superior workman which he was bound to obey? and (2) was it brought about by the negligence of such superior workman? This view seems to be borne out by the decision in *Sweeney v. M'Gilvray*, just referred to, and which was pronounced subsequent to the first part of this paragraph being put in type.

It is enacted by the fourth sub-section of section 1

that the master is liable where an accident happens and the injury is occasioned "*by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf.*" This sub-section has, however, to be read in connection with the second sub-section of section 2, which enacts that under the fourth sub-section of section 1 the injured workman shall not "*be entitled to any right of compensation or remedy, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned, provided that where a rule or bye-law has been approved or accepted as a proper rule or bye-law by one of Her Majesty's principal Secretaries of State, or by the Board of Trade, or any other Department of Government, under or by virtue of Act of Parliament, it shall not be deemed, for the purposes of this Act, to be an improper or defective rule or bye-law.*"

This fourth sub-section of section 1 differs from the other sub-sections in respect whatever fault has brought about the accident is not the *culpa* of a delegate but of the master himself. It will be observed that the sub-section in question almost seems to lay down what is a doctrine of common law for a fault in system. The master has always been held liable for a fault of system at common law, although in certain cases the defence of knowingly working under a dangerous system and accepting the risk as one incident to the employment has been found a valid one. According, however, to the judgments of the Second Division in *Grant v. Drysdale* and *Murdoch v. M'Kinnon*, such a defence is not always available at common law, and the

third sub-section of section 2, as we have already seen, seems to bar this defence in cases under the Act where the workman was aware that the master was in the full knowledge that he was working with defective plant or machinery. The clause may so far be split into two. The master is responsible for (1) defective rules and bye-laws, and (2) particular instructions given by any person delegated with the authority of the employer in that behalf.

With regard to the first of these points, Messrs. Roberts and Wallace say—"The alteration effected seems to be that the employer is bound to answer for any impropriety in the rules or bye-laws under which his business is carried on, whether there has been any negligence on his part or not, and therefore he would be liable although he may have taken due care to employ a competent person to frame the rules or bye-laws. It is thought, however, that this is not to be taken to mean that if a workman entered into or remained in the service of the employer with full knowledge both of the impropriety of the rules and the risk incurred thereby he can nevertheless afterwards complain of an injury received in consequence. For the workman has been given the same remedy only which a member of the public would have, as to whom, of course, the maxim *volenti non fit injuria* applies." With the first sentence of this quotation I agree; but, having regard to the third sub-section of section 2, as previously explained, I am inclined to take a different view from the learned authors as to the remaining in the employment in the knowledge of the defective system barring the pursuer's claim.

My view has been confirmed by the recently-issued



English decision of *Webbin v. Ballard* (22nd March, 1886, 17 Q.B.D., 122). In that case, which I have also had to refer to in connection with other points of my subject, Mr. Justice Smith, in delivering the opinion of the Court (Mathew and A. L. Smith, J.J.), *inter alia*, said:—"In our judgment, however, the Legislature, while taking from the employer the two defences above-mentioned, has given him a statutory defence under section 2 sub-section 3 which theretofore did not exist. It is this. The employer, when sued for a defect in the ways, plant, or machinery, may set up that the servant knew of the defect and did not communicate it to him, the employer, or to some other person superior to himself in the service of the employer. This, if proved, would avail the employer as a defence; *and the only excuse which the workman would have for not communicating the known defect would be to establish that he was aware that the employer knew of it.*"

In the case referred to the County Court Judge held there was liability on the part of the master because, although the workman was himself in the knowledge of the defect which brought about the accident, he was aware that the employer also knew of such defect. That case is not in conflict with *Stewart v. Evans* (49 L.T., 138), as explained by Mr. Justice Smith. A distinction falls to be drawn between the defences of *contributory carelessness* and *accepting a risk as incident to the employment*. The defence of contributory carelessness is not affected by the Act, but the defence of accepting risk as incident to the employment is modified to this extent, that the master shall not be allowed to plead it in the case where the workman was aware of the master being in the know-

ledge of a defect of machinery, plant, or faulty system which brought about the accident complained of. Faulty system is, I think, brought within the purview of the Act under the words in sub-sec. 3, sec. 2, "negligence which caused his injury," in the body of that sub-section, and "or negligence" at its conclusion in conjunction with the sub-section I am dealing with (see p. 248).

A point is raised by Messrs. Roberts and Wallace in connection with an act or omission which has brought about an injury, but with regard to which the rules or bye-laws are silent. They say:—"If the act or omission has by the rules or bye-laws been either expressly or impliedly enjoined to be done or made there is little difficulty in seeing the applicability of the sub-section. But where the act or omission is one in respect of which the rules or bye-laws are absolutely silent, neither enjoining or prohibiting it, a very great difficulty may arise. Can the omission to adopt a precaution which is not ordered by the rules or bye-laws be said to be an omission made in obedience to such rules or bye-laws? Can an act which is not prohibited or alluded to by the rules or bye-laws when done be said to be done in obedience to such rules or bye-laws? This latter question is obviously to be answered in the negative, and therefore in respect of such acts this sub-section imposes no liability upon the employer, whatever may be his position *aliunde*. As regards the former question, it may be answered, there can be no obedience without an order, but if this be so it is hard to say what effect is to be given to the word 'defect,' which seems to import an absence in the rules or bye-laws of something which should have been inserted

in them as opposed to 'impropriety,' importing the presence of something which should not have been inserted. Upon the whole, although much may no doubt be said in support of either view, yet, as effect must as far as possible be given to all the words of the sub-sections, and as it seems an abuse of language to speak of an omission as being made 'in obedience to' rules or bye-laws which contain no allusion to it either way, it is submitted that the word 'impropriety' means the enjoining of an act which itself ought not to be done, while 'defect' refers to a provision obedience to which necessitates the omission of some proper precaution, and it is suggested that the words are to be read distributively, as an act done in obedience to an impropriety, an omission made in obedience to a defect."

They then go on to say:—"If this be so, the Act would appear not to deal with a case in which there has been an omission from the rules or bye-laws, but to leave the workman to whatever remedies he had before in respect of carrying on the work under an improper system. It must be confessed, however, that the view here taken has been arrived at with much hesitation, and that its adoption entails the treatment of the words 'defect' and 'impropriety' as almost synonymous."

With the conclusion of the authors as to this matter I agree, but I arrive at the conclusion without, as it seems to me, the needlessly subtle reasoning of the authors. There is nothing, the same authors say, to limit the word "rules" to written rules. I can conceive an argument against this view, but I think the learned authors are right. The clause then has reference to the rules of the work and to certain written or printed bye-laws.

Now, if there is nothing in the rules or bye-laws through obedience to the letter of which an accident has happened, it seems to me plain that an injury which has come about, let us say, because there should have been some additional rule or bye-law compliance with whose provisions would have prevented the injury, cannot be said to be an injury which has come about by anything done in obedience to the rules or bye-laws. The words "act or omission" have to be read in connection with the words "done or made in obedience to the rules or bye-laws of the employer." It is not an "omission" from the rules, but an omission in consequence of the rules, which is to infer liability, and the proviso at the end of the clause, "provided such injury results from some impropriety or defect in such rules, bye-laws, or instructions," does not in any way affect the leading clause, the proviso being inserted *ex facie* in the interests of the master, and practically being simply to the effect that he shall be protected if such rules or bye-laws are not faulty.

So far, therefore, as rules or bye-laws do not affect an "act or omission" which has brought about an injury, there is no responsibility under this sub-section, the Act leaving the ordinary rules of common law to meet such cases. But where a workman has met with injury through having worked on a dangerous system, he being aware his master knows of the dangerous system, he may recover damages, though himself aware of the risk, because the accident may fairly be said to have come about through faulty rules (sub-sec. 3, sec. 2).

(2) *Particular instructions given by any person delegated with the authority of the employer in that behalf.*

In Mr. Sym's book (*Analysis of the Employers'*

Liability Act, 1880, 2nd ed., p. 46), after quoting these words, he says they "seem, looking to the connection in which the words are used, simply to be an order given by a person who has no authority to do anything but act as the messenger of the employer in giving the order." Messrs. Roberts and Wallace draw, however, an ingenious distinction. They say (p. 284):—"The employer may have authorized the delegate to give some definite instructions which he himself had to specify, or generally to give some instructions; and those framed by the delegate himself, in pursuance of his authorization, will equally with the former come within the terms of the sub-section. For these latter instructions the employer would not formerly have been liable, as the impropriety in them would not have been attributable to a personal breach of duty unless there had been negligence in the choice of the delegate. If the employer has himself definitely specified the instructions to be given to the delegate, the latter would have been merely the mouthpiece of the employer for conveying the improper instruction, and the negligence would have been personal to the employer, for which he has always been responsible." This distinction seems to me sound.

I wish to advert again to the question of faulty system and the effect of sub-sec. 3, sec. 2. If arguable, that faulty system does not fall under faulty rules in the general case I think the words "particular instructions, etc.," would embrace faulty system. Because, where an accident happens through a faulty system, the injured workman has probably been working in obedience to the instructions of some superior workman delegated with the authority of the employer



in that behalf. Let me explain my meaning by an illustration. If a workman has been killed through an unnecessarily dangerous system of shunting waggons pursued in the knowledge of the master, he will, in the ordinary case, have been working under the orders of some one acting in obedience to instructions in connection with the work which led to the fatality. If proveable that the workman knew the master was aware of the dangerous system, then sub-sec. 3, sec. 2 would bar the defence of known danger.

By the fifth sub-section of section 1., the employer is made liable for personal injury caused to the workman "*by reason of the negligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine, or train upon a railway.*" This section, as will be seen from its terms, has been devised principally for the protection of railway servants. It is to be observed that it was intended to put railway servants on a more favourable footing than other workmen, for this clause applies to all railway servants whatever their grade, and embraces a larger number of classes of servants for whose negligence the employers are made expressly liable.

Mr. Sym refers to Mr. Campbell's statement in the recent edition of Lord Fraser's "Master and Servant," that under "railway" falls to be included "tramway." Mr. Sym says:—"There is no doubt that, as pointed out by Mr. Campbell in his recent edition of Fraser on 'Master and Servant' (p. 234), the original legal signification of the word would include tramways. On the other hand, recent Acts of Parliament, adopting the popular and well-understood distinction, used

‘tramway’ in contrast to ‘railway,’ *e.g.*, the General Tramways Act, 33 and 34 Vict., cap. 78, secs. 25 and 26. It is thought, with much deference for the opinion expressed by Mr. Campbell, that the Employers’ Liability Act adopts the popular distinction, and that a tramway is not included under the term railway. The use of such words as ‘train,’ ‘points,’ ‘signal,’ ‘locomotive engine,’ seems to indicate that the word railway is used in its ordinary popular sense.” I quite agree with Mr. Sym as to this point; but Messrs. Roberts and Wallace discuss it at some length, with the result of inclining to take a different view.

In the case of *Doughty v. Firbank* (28th March, 1883, L.R., 10 Q.B.D., 358) the question came up of whether a temporary line used for purposes connected with the construction of a new line of railway was to be regarded as a railway in the sense of the Act. The Court held that it was, because the temporary line was a railway in the ordinary meaning of the word. This decision goes somewhat farther than the special case, for the ground of judgment there was, as we have seen, that the ordinary meaning of the word must be given effect to. Hence it follows that in the sense of the Act this clause is not only applicable to the case of servants of railway companies, but to all employers of labour who, in connection with their works, use locomotives and railways. Thus Messrs. Roberts and Wallace say:—“It must not be supposed that railway companies are the only employers upon whom liability is imposed by the sub-section now under consideration. There are several businesses in which the possession or use of a private railway is almost a necessity, and it cannot be said, for the purposes of this Act, that these

are any the less railways because they are not open for public traffic, for the Act does not deal with the rights of the public. As instances of such railways, the private lines and sidings connected with mines, collieries, docks, foundries, etc., may be referred to." Indeed, in the case just quoted, Mr. Baron Pollock said:—"There are many railways used by colliery owners and others upon which trains run, and there seems to be nothing in the words of the Act to limit its application to railways used by railway companies.'

One of the most important cases in connection with the clause I am dealing with is that of *Gibbs v. Great Western Railway Company* (11 Q.B.D., 22, affirmed on appeal, 12 Q.B.D., 208). This was an action brought under this section of the Act. The rubric bears:—"The evidence showed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal-boxes, being kept in proper condition; and that F., having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow-workman." It was held by Field and Mathew, J.J., in the Divisional Court, on appeal from the Marylebone County Court, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of section 1, sub-section 5,

of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence. In the course of his opinion, Mr. Justice Field said:—"Now, certainly, there was a person in this case who had the 'control' of the points. They are worked by a man in the box by means of a highly complicated piece of mechanism. Undoubtedly he had 'control' of them under sub-section 5. It is not suggested that F. had 'control' over the points, but it is said that he had 'charge' of them. What is the meaning of 'charge' or 'control' of the points? I doubt whether the words charge or control are intended to mean different things. If they are, and if the man in the signal-box was not the person in this case who had both charge and control of the points, possibly Saunders, the inspector, had charge, and the man in the signal-box had control. Fisher's position was this" (the learned Judge then explained the state of matters already detailed and went on)—"Can it be said that the man who taps the wheels of the carriages when a train stops at a station, or puts grease into the boxes of the axles, has 'charge' of them. I doubt whether what Fisher did came to more than that." The Court of Appeal, consisting of Lord Chief-Justice Coleridge, Lord Esher (Master of the Rolls), and Lord-Justice Bowen, affirmed this judgment.

Another case of importance in the construction of this clause is that of *Murphy v. Wilson*, (52 L.J. Q.B., 524). In that case the plaintiff was a labourer in the service of certain contractors employed to widen the line of the London and North-Western Railway Company between Leeds and Huddersfield. In order to carry out the work, a temporary line of rails was

laid down over a new part of the line, and upon such rails a steam crane was used. This steam crane was a combination of a crane and steam engine. They were mounted upon the same truck, forming one machine, so constructed that the engine served the double purpose of raising stones by means of the crane and also of moving the truck upon the rails from place to place. An accident happened in connection with this machine, and the question had to be determined by the Court whether this machine fell under the words "locomotive engine upon a railway." This question was answered in the negative, Baron Pollock saying, "This machine seems to me to have no connection with an ordinary locomotive." I incline to believe that a Scotch Court would have adopted a broader construction.

I will only refer to one more case in connection with this sub-section—viz., that of *Cox v. Great Western Railway Company* (9 Q.B.D., 106). The rubric bears:—"H., who was in the employ of a company as a 'capstan-man,' without giving the usual warning propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in another line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance. Held that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of a 'train upon a railway' under section 1, sub-section 5, of the Employers' Liability Act." One of the chief questions under discussion here was whether such series of trucks could be regarded as a "train." Mathew and Cave, J.J., both



came to be of opinion that they did constitute a train. Mr. Justice Cave said :—" Does it make any difference that there was no locomotive engine, but a stationary hydraulic engine and a capstan under his control, and that the place was a goods station, into which the line of rails extends for the purpose of effecting the delivery of the contents of the trucks ? Looking at the danger of putting these things in motion without proper warning it seems to me immaterial whether the motive power was fixed or movable, or upon which portion of the line the accident happened."

I think it unnecessary to refer at greater length to this section here. More specific information as to different points under it will be found in Part IV.

I have now gone over those provisions of the Act which are of importance as regards Scotland. It is desirable, however, to complete the analysis of the Act, and there is one subject at least which considerably affects procedure in England still not dealt with. I have found it more convenient not to take up the clauses in the order of the statute.

By the fifth section of the Act it is provided, "There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause or action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action ; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman

for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty, or part of a penalty, under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty, or part of a penalty, under any other Act of Parliament in respect of the same cause of action."

I am not aware that there have been any decisions, either in England or Scotland, with reference to this provision. In explanation of its meaning reference may be made to the 82nd section of the Factory and Workshop Act, 1875 (41 and 42 Vict. c. 16). By that section it is provided, "If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act, to be securely fenced, or having neglected to maintain such fencing, or in consequence of the occupier of a factory or workshop having neglected to fence any vat, pan, or other structure required by or in pursuance of this Act to be securely fenced, or having neglected to maintain such fencing, the occupiers of the factory or workshop shall be liable to a fine not exceeding £100, the whole or any part of which may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines."

Hence it follows that, supposing there had been a prosecution against an employer for some failure under the Factory and Workshop Act, in consequence of which death had resulted to a servant, and a penalty of £100 had been inflicted which the Home Secretary had apportioned to the family of the deceased, and if sub-

sequently an action under the Employers' Liability Act had been raised by the representatives of the deceased in estimating the damage to be paid, the Court or jury would under this fifth section of the Act be required to deduct this sum from the sum which would otherwise be awarded. Conversely, if an action was raised under the Act of 1880 for compensation under the Act, and a sum in name of damages awarded under the Act, and if afterwards a prosecution was instituted at the instance of the Inspector of Factories for the failure to fence which had brought about the accident, the Home Secretary could not then allocate any portion of the penalty to the representatives of the deceased.

Under the 82nd section of the Factory and Workshop Act quoted above, it is to be observed it is discretionary to the Secretary of State to award the penalty or any portion thereof to the injured man or his representatives; hence, although a prosecution had been instituted and a penalty awarded, it does not necessarily follow that the penalty must be deducted from the amount of compensation awarded in an action for compensation brought under the Act of 1880, this only being done where such penalty or portion thereof has been applied for behoof of the injured man or his representatives, and only then to the extent to which such Secretary of State has made such allocation.

At pp. 167-8 I quoted part of the sixth section of the statute. It was noted that in Scotland while the power of removal to the Court of Session at the instance of either party is absolute, in England it is a matter in the discretion of the Superior Court. It is to be observed that while there is this discretionary power of removal in England, the Superior Courts almost invari-

ably refuse to permit the removal from the County Court. The opinion of Lord Esher, M.R., in the case of *Reg. v. Judges of the City of London Court* (14 Q.B.D., 905) correctly indicates the view which the Judges of the Superior English Courts are inclined to take with regard to the matter. Lord Esher said:—“If it be said that orders for the removal of actions under the Employers’ Liability Act have been often refused, then I would say that I should think the refusal was right, for the statute states clearly that the County Court is the tribunal in which the action is to be tried, and I do not think that such an action should be removed simply because of the amount of damages claimed, unless some difficult question of law is raised.”

Mr. Ruegg, in his evidence before the recent Committee of the House of Commons, refers to the almost absolute impossibility of getting the Superior Courts to remove Employers’ Liability actions from the County Court. He said:—“I have tried in many instances to remove a case, and have only succeeded once, and that was where the claim was for £1,000. It was thought such an exceptional amount, that after considerable difficulty it was removed.”

The method of procedure where removal is sought is to apply to the Superior Court for a writ of certiorari. Sub-section 1 of section 6 provides every action for recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of either plaintive or defendant, be removed into a Superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed.” The Superior Courts, as we have seen in the actions laid on the Act, almost invari-

ably refuse to grant the writ of certiorari. Mr. Ruegg, in answer to the question, "You find it rather difficult to get a certiorari?" said—"We have to go to a Superior Court to grant a writ of certiorari, and they will not do it."

"Section 6—(2) Upon the trial of any such action (an action for compensation under the Act) in a County Court, before the Judge, without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

"(3) For the purpose of regulating the conditions and mode of appointment, and remuneration of such assessors and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a County Court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repeated from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in County Courts.

"County Court shall, with respect to Scotland, mean the Sheriff Court, and shall, with respect to Ireland, mean the Civil Bill Court.

"In Scotland the Sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries."

The procedure as to the appointment of juries in the English County Courts is regulated by 9 and 10 Vict. cap. 95. Where the amount claimed exceeds £5, either party to the action may demand a jury trial (section 70). Under £5, it is discretionary to the Judge to grant or refuse it. By the seventy-third



section of the Act, five is the number of the jury, who are always common jurymen.

Elaborate County Court rules have been issued with regard to the appointment of assessors. I print in the Appendix the County Court rules under the Employers' Liability Act issued in 1886. These are clear and distinct, and do not require explanation. A County Court Judge may, in the option of the parties, sit alone without jury or assessors, or with a jury and without assessors, or with assessors and without a jury. He is final as to fact where he sits without a jury, and if with a jury, and the jury have returned a verdict, his judgment as to whether it is or is not against the weight of evidence is not subject to review.

No rules of procedure have been issued by the Court of Session, but the English Courts have issued these from time to time. In the recently issued County Court rules there are provisions as to the consolidation of actions. In the previous County Court rules there were no such provisions. As matter of practice I have found the provision in the sixth section—viz., "In Scotland the Sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties, and in respect of different injuries"—a very convenient one. Among other cases where I availed myself of this provision, that of Goodwin against the Walkinshaw Oil Company (1 Scot. Law Rev., 120) may be referred to. In that case by a pit explosion one man had been killed and three injured. An action was brought at the instance of the widow and the children of the deceased workman, and also by the three injured men. These actions were conjoined under the section referred

to. One proof was taken applicable to all the cases and judgment given in an interlocutor applicable to all the different claims.

By the ninth section of the Act it came into operation on 1st January, 1881.

By the tenth and concluding section it is provided, "This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the 31st day of December, 1887, and to the end of the then next session of Parliament and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired."

It is to be noted the period of expiry is not the 31st December, 1887, but the end of the next session of Parliament thereafter. Parliament generally rises early in August, so that if by any accident or stress of business no Act should actually be passed, actions under the Act could still be raised till the beginning of the autumn of 1888. Once raised before the expiry of the session, they could then be pursued till final judgment was given.

NOTE.—A question of practical difficulty has been raised as to who can grant a valid discharge for minor or pupil children where a sum in name of compensation falls to be awarded to them on account of the death of their father. This difficulty is of course present not only in actions under the Employers' Liability Act, but also where liability is established or admitted in actions brought at common law, and whether it is a common law liability arising from the relationship of master

and servant between the fatally injured man and the defender or defenders, or whether there is liability on account of the former being a member of the outside public. It is, I think, as convenient a time to discuss this subject at the close of Part III. as at any other point of this work.

As the law stands, a father is tutor or curator at law of his pupil or minor children. Pupil children are boys under fourteen or girls under twelve, and the discharge of the father would be a valid discharge for any sums to which such children are found entitled at his own hands when the children are pupils, and conjointly with the children when they are minors. Where, however, the sums to which they are found entitled are due for his death, what then ?

An Act was passed in the last session of Parliament which has an important bearing on this question. In one or two cases which have been before myself, and where liability was admitted or proved on consignment of the sum either admitted as due or when it was the extent of the damage assessed, I have granted absolver, and I take it that the acquiescence in such an interlocutor is an effectual discharge; but such an interlocutor on my part has only proceeded on the footing that the Court is entitled to take such measures of precaution with regard to the protection of such sums for behoof of children as may seem desirable and expedient. In different cases I have directed payment of sums for children's behoof to the manager of the National Security Savings Bank, Glasgow Branch.

The Act, however, referred to makes the following important provisions:—" 2. On the death of the father of an infant, and in case the father should have died

prior to the passing of this Act, then from and after the passing of this Act the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother.” “ 8. In the application of this Act to Scotland the word guardian shall mean tutor and the word infant shall mean pupil.” “ 12. In Scotland, tutors being administrators in law, tutors nominate and guardians appointed or acting in terms of this Act, who shall by virtue of their office administer the estate of any pupil, shall be deemed to be tutors within the meaning of an Act passed in the 12th and 13th years of the reign of Her Majesty entitled an Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland, and shall be subject to the provisions thereof, provided always that such tutors, being administrators in law, tutors nominate and guardians aforesaid, shall not be bound to find caution in terms of the 26th and 27th sections of the last recited Act, unless the Court, upon the application of any party having interest, shall so direct.”

As these pages were passing through the Press a very important case, not only as to the construction of the clauses quoted above, but also as to the title of minor children to give valid discharges for sums falling to be paid to them in consequence of an accident having brought about the father's death, came

up in the First Division of the Court of Session. The case is *Jack v. N.B. Railway Company*, 16th December, 1886.\* Mr. Jack was killed by the bursting of an engine at Balloch Station. He left seven children, two of them minors and five of them pupils. He also left a widow. An action of damages was raised against the Railway Company on account of the children, the widow's own claim having been extrajudicially settled. A sum of £2,100 was claimed, being £300 for each child, but before the case went to the jury a settlement was arrived at by joint minute to pay £350, or in other words £50 to each of the seven pursuers. The case came before the First Division to give effect to the arrangement made, but questions were raised and argued as to how a valid discharge should be given. Counsel for the children argued that, under the clauses of the Guardianship of Infants' Act quoted, the mother could give a valid discharge for the pupil children, and as to the two minor children he was prepared to assent to the appointment of curators. It certainly does seem somewhat anomalous, as Lord Shand remarked, that it should be necessary to appoint curators to the elder children while the mother should be able to act as legal guardian for the younger. This indeed is apparent when it is considered that the mother would remain the custodian of the funds when the pupil children in the natural course of time became minors. In the view which the Court took, it was thought unnecessary to appoint curators, the minor children being themselves held

\* As I write, there is no legal report of the case, but name and date will afford a sufficient index for reference when the legal reports are published. I quote the judgment of the Lord President from the *Glasgow Herald*, which I have no doubt gives it with substantial accuracy.



entitled to give a discharge, while the mother's title to act as guardian of the pupil children was sustained. As the opinion of the Lord President is instructive and interesting, I make no apology for quoting an extract from his opinion of some length.

After narrating the facts he proceeded thus :—"Now, as regarded the pupil children, their case was met by the recent Guardianship of Infants' Act, which entitled the mother of pupil children to act as their tutor, and she apparently, under that statute, had as good a right to discharge their claim as a father would have if that had been a claim which had arisen during his lifetime. But as regarded the children who had attained minority the question was more difficult. They had no curator, and therefore it was contended on the part of the defenders that they could not discharge themselves. That was a point which they had not yet had occasion to consider with reference to questions of this kind. There were three cases which had been before the Court on the application of parties like the present. One of these was Black against Angus. In that case the Court refused to grant decree against the defenders of the action, the children being all pupils, until a proper guardian had been appointed. That obviously did not apply here. The next case, *Anderson v. Kydd*, was that of a widow who was sole pursuer on behalf of herself and one pupil child, and there also the Court declined to grant decree without a tutor being appointed. The remaining case, *Anderson v. Muirhead*, was one of minor children, who had made a demand in their own name for decree ; but they themselves seemed to have considered that they ought to have a guardian, and the Court refused to proceed until

a curator or a factor of some kind had been appointed. But the point arose now from the minor children asking for decree in their own name. The general rule of law was thus stated by Erskine:— ‘Every deed of a minor who has no curator is as effectual as if he had curators and had acted with their consent;’ and if the rule was of universal application it put an end to all dispute, but it was subject to some modification. He thought Professor More perhaps stated as accurately as anybody the result of the cases which he considered in detail. Professor More said:— ‘Minors which have no curators may act by themselves, and payments made to them by their debtors are valid and effectual; but the Court of Session will not in every instance compel the debtor to pay the minor who has no curator, at least without his giving security to keep the debtor indemnified.’ Now, the case upon which the qualification of the general rules chiefly rested was the case referred to in Lord Fraser’s book, viz., *Kirkman v. Pym*. It afforded a very good illustration of the sort of qualification with which the general doctrine of Mr. Erskine was to be received. In that case it was stated Pym was indebted to Kirkman’s father, an alderman of London, in a large sum of money, secured by an heritable bond upon some houses in Edinburgh. On the death of Alderman Kirkman the son succeeded to his heritable fortune; but no curators had been appointed to him, and he chose none for himself. In the seventeenth year of his age he demanded payment of this debt—which, be it observed, was a large sum of money secured by the heritable bond. An objection was taken by the debtor that, ‘as the minor was without curators, payment

could not then be made to him with safety.' It was observed from the bench 'that this question which relates to a payment of a principal sum is to be distinguished from all cases in which the interest only of money or the rents of subjects are claimed; those ordinary acts of administration which might be necessary for a minor's support. Accordingly the Lords were of opinion that as the debtor could not even by making full money be secure against future challenge unless the money were to be afterwards profitably employed for the minor's behoof, so the Court ought not to interpose their authority in order to compel him to do an act which would subject him to that hazard.' Now the distinction there taken between a large capital sum, which fell to be invested, and income, whether in the shape of interest or rents, was very important, and it was in applying that doctrine to the present case that the only difficulty arose. Now it appeared to him that the sum of money which each of these minors proposed to discharge without the intervention of a curator could not be described as a large sum for investment. It was a sum which the law had given these children to repair the loss they had sustained upon the death of their father, and it appeared to him that the loss which they had sustained upon the death of their father was just the liability which the father would have been under to maintain and educate them; and if the sum which came in place of his paternal care and administration was the sum of £50, that seemed rather a sum which went to satisfy immediate charges—that was to say, charges for the maintenance and education of these minors; and so his Lordship thought it fell within the general rule, and

not within the exception, and that the minor children had a good title to discharge that sum."

In this opinion all the other Judges concurred, and the decision, it will be seen, is one of great practical importance in connection with actions of damages raised on account of the death of a father by minor and pupil children.

## PART IV.

THE EMPLOYERS' LIABILITY ACT, 1880,  
WITH NOTES.

43 AND 44 VICT. CAP. 42.

*An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service.*

*Be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows :*

WHILE sometimes referred to by the Judges as giving an indication of the object of the Legislature, it is held by the Courts that the title of an Act of Parliament does not form a part of the Act, and is not to be looked to in construing any passage in it. Poulter's case, 11 Coke's Rep. 33 b; *Graves v. Ashford*, L.R., 2 C.P. 410; *Johnson v. Upham*, 2 E. and E. 250; 28 L.J. Q.B. 252; *Taylor v. Newman*, 4 B. and S. 89; 32 L.J.M.C. 186.

The same remark applies to the marginal rubrics. *Claydon v. Green*, L.R., 3 C.P. 511; 37 L.J.C.P. 226. *Jessel, M.R. in Sutton v. Sutton*, 1882, L.R.



22 Ch. D. at p. 513. *Farquharson v. Whyte*, 1886, 13 R. (Just. cases) 29 (per Lord Justice-Clerk and Lord Young).

*I. Where after the commencement of this Act personal injury is caused to a workman*

The "commencement of the Act" was 1st January, 1881. See sec. 9.

The words "personal injury" are, it is evident from the context, used in their ordinary or popular sense as meaning physical injury to the person, including injuries to health, such, for example, as may be caused by defective sanitary arrangements.

By sec. 8 the word "workman" is defined as follows, viz.: "The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

As the Act is thus in express words made applicable to railway servants in addition to those persons to whom the Employers and Workmen Act, 1875, applies, it is thought the intention must be to make it applicable to all persons, whether engaged in manual labour or not, and irrespective of their grade, who can properly be called railway servants.

The question as to who are railway servants is not so easy to answer. The expression, it is thought, is not equivalent to servants of a railway company, and would not include servants employed by such a company in a hotel, steamboat, or other labour not connected with a railway. It must rather, it is thought, be taken to mean servants employed in or about the work or management of a railway, as that word is to be understood in this Act. For a discussion of the meaning to be attached to that word reference is made

to the notes to sub-sec. 5 of this section, which deals specially with accidents upon a railway.

By the Employers and Workmen Act, 1875 (38 and 39 Vict. c. 90), sec. 10, the expression "workman" is so defined—"The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Section 12 of the same Act provides that "the Act so far as it relates to apprentices shall apply only to an apprentice to the business of a workman as defined by this Act upon whose binding either no premium is paid or the premium (if any) paid does not exceed £25, and to an apprentice bound under the provisions of the Acts relating to the relief of the poor."

Section 13 provides that "this Act shall not apply to seamen or to apprentices to the sea service."

By the Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 and 44 Vict. c. 16), sec. 11 it is enacted that "the 13th section of the Employers and Workmen Act, 1875, shall be repealed in so far as it operates to exclude seamen and apprentices to the sea service from the said Act, and the said Act shall apply to seamen and apprentices to the sea service accordingly; but such repeal shall not in the absence of any enactment to the contrary extend to or affect any pro-

vision contained in any other Act of Parliament passed or to be passed whereby 'workman' is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies.

*Domestic or menial servants.*—To these classes of servants there is by the law of England a special rule of law applicable, viz., that their hiring is presumed to be by the year, terminable on either side by a month's notice (Stephen's Comm. 3rd edn. 243), which has made it necessary for the Courts in that country to decide what servants fall within these classes. The following decisions may be referred to as helping us to a definition of these terms:—

Nowlan v. Ablett, 2 C.M. & R. 54; 1 Gale 72; 5 Tyr. 709, where it was held that a head gardener on yearly wages, with inferior gardeners under him, living rent free in a house which was not under his master's roof, was not a menial servant; Nicoll v. Greaves, 17 C.B. (N.S.) 27; 33 L.J.C.P. 259, where it was held that a huntsman is a menial servant; and Johnson v. Blenkinsopp, 5 Jur. 870, where it was held that a general garden and stable hand, receiving a weekly salary and sundry payments in kind, along with a free house, firing, etc., was a menial servant. See also Lilley v. Elwin, 11 A. & E. 742; 17 L.J. Q.B. 132, and Reg. v. Wortley, 21 L.J.M.C. 44, where it was held that a person taking charge of glebe lands at a fixed salary, and with a share in profits and a free house, was not a menial servant, but a labourer; and that the agreement between him and his employer was admissible in evidence unstamped, as it fell within the exemption in the Stamp Act as an agreement for the hire of a labourer.

*Labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour.*—In interpreting these words, it must be kept in view that the Employers and Workmen Act, 1875, is the last of a series of Acts dealing with this subject which contain definitions of the term workman more or less similar to that contained in this Act. According to a well known rule of law, where a judicial construction has been put upon the words of an Act of Parliament, and the Legislature in a subsequent Act *in pari materia* uses the same words, it is presumed to intend that they shall bear the construction which has been so put upon them (Jones L.J. in Dale's case, 6 Q.B.D. 376, 453; Blackburn J. in Jones v. Mersey Docks, 11 H.L.C. 443, 480). It therefore becomes necessary to notice the various decisions which have been pronounced under former Acts *in pari materia*.

Under 20 Geo. II., c. 19, in which the definition clause is, that "all complaints, differences, and disputes which shall happen and arise between masters and mistresses and their servants in husbandry who shall be hired for one year \* or longer, or which shall happen or arise between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner, shall be heard, determined," etc., the following decisions have been pronounced, viz.:—

Lowther v. Radnor, 8 East 113, where it was held that 20 Geo. II. c. 19 extended to labourers of all descriptions, and not merely to those in the particular

\* This restriction as to the term of hiring was altered by a subsequent statute.

trades or businesses there enumerated, and consequently that it extended to a labourer who had contracted to dig and stein a well for cattle, to be paid by the foot, and who employed another to assist him in the work; *Branwell v. Penneck*, 7 B. & C. 536, where it was held that a caretaker employed by an attorney to look after goods seized under a writ did not fall under the Act; and *ex parte Hughes*, 23 L.J.M.C. 138, where it was held that a dairymaid, who besides performed sundry duties *intra moenia*, was a "servant in husbandry" under the Act.

Under 4 Geo. IV., c. 34, in which the definition clause (sec. 3) is that "if any servant in husbandry, or "any artificer, calico printer, handicraftsman, miner, "collier, keelman, pitman, glassman, potter, labourer, "or other person shall contract with any person or "persons whomsoever to serve him, her, or them for "any time or times whatsoever, or in any other "manner, and shall not enter into or commence his or "her service, etc., it shall and may be lawful for any "Justice," etc., etc., the following cases have been decided, viz.:—

In Scotland—*Normant v. Wilson*, 1845, 2 Brown 375, where it was held that the Act was not applicable to domestic servants; and *Clarke v. M'Naught*, 1846, Arkley 33, where it was held under the circumstances that a servant engaged by a farmer to act as kitchen woman and byre woman came under the class of servants in husbandry specified in the statute.

In England—*Ex parte Ormerod*, 1 D. & L. 825; 13 L.J.M.C. 73, where a designer of patterns for calico printers was held to be an "artificer" under the Act, or at all events to fall within the general description



of sec. 3, it being further held unnecessary to state under which of the various classes of employment enumerated in the section that of "designer" came, it being sufficient if the Court should be of opinion that the service or employment of "designer" was a service or employment within the section (see opinion of Williams, J.)

*Ex parte* Gordon, 25 L.J.M.C. 12, where a journeyman tailor was held to fall under the Act.

Willett *v.* Boote, 6 H. & N. 26; 30 L.J.M.C. 6, where A by agreement in writing contracted to serve B and C as a biscuit oven placer at four shillings a day for twelve months, and by another agreement of the same date, R agreed to serve B and C for the same period as a biscuit oven fireman, to be paid by piece work, he paying A his wages out of what he earned, and it was held that the relation of master and servant subsisted between B & C and A, notwithstanding his wages were paid by R, and consequently that he was properly convicted for absenting himself from B and C's service.

Davies *v.* Berwick, 3 E. & E. 549; 30 L.J.M.C. 84, where a person engaged by the owner of a farm to keep the general accounts of the farm, to weigh out the food for the cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out the orders given to him, was not a servant in husbandry within the Act. The ground of judgment was that his principal work was to keep the general accounts, that his obligation to make himself generally useful was only accessory to his principal work, and that as the provision in the Act applied only to persons who are engaged to do some manual work, he did not fall within it (see opinion of Crompton, J.).

*Lawrence v. Todd*, 14 C.B.N.S. 554; 32 L.J.M.C. 238, where an iron shipbuilder contracted in writing with six skilled handicraftsmen to complete a vessel. They agreed exclusively to serve him subject to the rules and regulations of the yard, and to execute the whole of the skilled and unskilled labour requisite to complete the entire hull of the vessel of the best workmanship and to the entire satisfaction of their employer (they employing and paying such skilled and unskilled assistants as might be requisite to complete the vessel with all despatch), and to be paid £5 per ton for the work so done by them. Held that the contracting parties were handicraftsmen within the Act.

*Whiteley v. Armitage*, 13 W.R. 144, where a person working manually on weekly wages and a commission and superintending other workmen, was held to be an "artificer" under the Act.

Such cases as *Hardy v. Ryle*, 4 M. and R. 295; 9 B. and C. 603; *Lancaster v. Greaves*, 9 B. and C. 628; *Ex parte Johnson*, 7 D.P.C. 702; 3 Jur. 481; and *M'Vey v. Blair*, 1844, 2 Broun 102, the decisions in which proceeded on the ground that the contract was not one for exclusive service are, it is thought, not now of importance, as the line there drawn has been removed by the introduction into the Employers and Workmen Act, 1875, of the words "or a contract personally to execute any work or labour."

The same remark applies to the decisions under Master and Servant Act, 1867 (30 and 31 Vict. c. 141), which turn upon this point. Upon the question of definition there are no decisions of importance under that Act. In *Millett v. Coleman*, 44 L.J.Q.B. 194, it

was held that the Act applied to a journeyman painter.

These Acts were all repealed by the Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c. 86), section 17, and the Employers and Workmen Act, 1875, was passed in their place.

Before proceeding to narrate the decisions under this Act, we shall notice shortly some of the decisions under the Truck Act (1 and 2 W. IV. c. 37), which has been held in England to be an Act *in pari materia* with the Master and Servant Acts (Laurence v. Todd, 32 L.J.M.C. 238, 241, per Erle J.), and the decisions under which have been followed as authorities in many of the cases already cited.

The workmen to whom that Act applies are throughout the Act spoken of as "artificers," and by the interpretation clause (section 25) the word "artificer" is thus defined: "All workmen, labourers, and other "persons in any manner engaged in the performance "of any work, employment, or operation of what nature "soever in or about the several trades and occupations "aforesaid shall be deemed 'artificers.'"

As the questions which have arisen upon the definition of "artificer" under this Act turn mainly upon this, viz., whether or not the individual in question is one engaged in manual labour, either as a servant or as having contracted personally to execute a work or labour in contradistinction to one who is an "employer" \* within the meaning of the Act, or an independent contractor, the decisions which have been

\* Section 25—"All masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be and be deemed to be employers."

pronounced must, it is apparent, be of considerable assistance in elucidating the definition with which we are now dealing.

The more important in this regard are the following, viz.:—

In Scotland—*Phillips v. M'Innes*, 1874, 2 R. 224, where it was held that the foreman of a slate quarry, although bound by the terms of his engagement to assist the workmen when he saw any of the operations “falling back” or “in need of being pushed forward,” was not an “artificer” but an “employer” in the sense of the Act.

In England—*Riley v. Warden*, 2 Ex. 59; 18 L.J. Ex. 120, where it was held that the Act is applicable only to those persons who contract as labourers, viz., such as contract to use their personal services and to receive payment for such services in wages.

*Floyd v. Weaver*, 21 L.J.Q.B. 151, where it was held that the provisions of the Act apply only to agreements for personal services and not to agreements for the performance of a certain quantity of work, which the contractor cannot perform except by making use of the labour of others.

*Sharman v. Saunders*, 13 C.B. 166; 22 L.J.C.P. 86, where it was held that one who contracts to do work upon a large scale, employing labourers under him, is not within the Act, though he superintends the work and from time to time labours personally therein.

*Bowers v. Lovekin*, 25 L.J.Q.B. 371; 6 E. & B. 584, where it was held that butty colliers engaged to get coal and ironstone from a mine at so much per

yard or ton, who are bound to work personally in the mine and who do so work, are "artificers" within the meaning of the Act, although they employ other workmen under them. The ground of judgment is contained in the words of Erle J.—"Persons who engage to work by the piece may be "artificers" within the Act though they do not contract to work personally, if their contract and position in life are consistent with the supposition of their doing the work in person, and they in fact assist in performing it themselves," and the case of *Sharman v. Sandars* (*supra*) was distinguished from the present case on this ground.

*Ingram v. Barnes*, 7 E. & B. 115; 26 L.J.Q.B. 82; affirmed 7 E. & B. 132, 26 L.J.Q.B. 339, where the plaintiff, an illiterate working man, attached his mark to a written contract with the defendant, by which he engaged to make as many bricks as the defendant required in his brickfield, finding all labour, the defendant finding the materials, payment to be 10s. 6d. per thousand for the bricks when complete; and the plaintiff assisted by others made the bricks, having worked at them personally. Having been paid by tickets for goods, he afterwards sued for the full price, contending that he was an "artificer" under the Act. Held that not being bound by his contract to do any of the work personally, he was not an "artificer" under the Act.

*Sleeman v. Barrett*, 33 L.J. Ex. 153, where it was held that a butty collier who undertakes for the performance of a piece of work by the day or ton or yard, and employs others to assist him to whom he pays wages, is not an "artificer" under the Act. It was laid down per Pollock J. that the distinction to be



looked to in these cases is that between a contract for labour and a contract for the result of labour.

*Pillar v. Llynvie Coal Company*, 38 L.J.C.P. 294. Here the plaintiff was a tinman and the defendants a company engaged in raising coal and making iron. The plaintiff was to work for the defendants either at piece work or by the day in their option. The piece work was the making of casts at fixed prices out of materials supplied by defendants, the day work repairing defendants' buildings. The plaintiff at times worked for other persons. He was paid like the other workmen of the defendants. Held that the plaintiff was obliged to give his personal services, and was therefore an "artificer" within the Act.

Reference may also be made to the cases of *Bishop v. Letts*, 1 F. & F. 401, and *Reg. v. Wortley*, 21 L.J.M.C. 44; but it is thought that these cases, being cases under the Stamp Acts, are not of much importance in interpreting an Act like the present.

Having now detailed the decisions under Acts *in pari materia* with the Employers and Workmen Act, 1875, we now proceed to those pronounced under that Act and under the Employers' Liability Act, 1880.

Under the Employers and Workmen Act, 1875, the following decisions have been pronounced, viz.:—

In Scotland—*Wilson v. Glasgow Tramways Company*, 1878, 5 R. 981, where opinions were given by the Lord Justice-Clerk Moncreiff and Lord Ormidale that a tramway car conductor is a "workman" within the meaning of the Act. See *ante*, p. 136.

In England—*Grainger v. Aynsley and Bromley v. Tans*, 6 Q.B.D. 182, where it was held that a potter's

printer under a contract with his employers to do work in which he was assisted by transferrers whom he himself engaged and paid, was a workman within the Act, and liable in proceedings before a magistrate to pay damages for a breach of his contract with his employers caused by his transferrers' refusal to do the work, although he was ready and willing to do it. Lindley J. remarked (p. 189)—“Manual labour is the keynote to it (the definition in the Act), and if so the appellants are within it. I should not be inclined to put a narrow meaning on a remedial Act of Parliament; but I think whatever doubt there may be in other cases these are clearly within it.”

*Jackson v. Hill & Co.*, 13 Q.B.D. 618, when it was held that a person who had entered into an agreement to assist a firm of practical mechanics in developing ideas and inventions suitable to the business of the firm, and who upon being ordered, after a disagreement with the firm, to do the work of an ordinary mechanic, refused and absented himself, was held to be improperly convicted by the magistrates, on the ground that such work was not within his contract.

This case though not in point is noted here, as the rubric in the Law Reports, which runs, “held that he was not a mechanic or workman under the Employers and Workmen Act, 1875,” is obviously erroneous. In a previous proceeding between the same parties, reported in 48 J.P. 7, it was held that he fell within the Act.

Under the Employers' Liability Act, 1880, the following decisions have been pronounced, viz.:—

In Scotland—*Oakes v. Monkland Iron Company*,

1884, 11 R. 579, where it was held that a fireman employed on board a steam canal barge was not a "seaman" within the meaning of the 13th section of the Employers and Workmen Act, 1875, and therefore that he was not excluded from the operation of the present Act.

In this case the meaning of the word "seaman" in the 13th section of the Employers and Workmen Act, 1875, was very fully discussed. The definitions in 17 and 18 Vict. c. 104, sec. 2, of ship, which is, "Every description of vessel used in navigation not propelled by oars," and of seaman, which is, "Seaman shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship," were cited; also the decisions which have been pronounced upon these definitions, in which it has been laid down that the criterion whether a vessel falls under the category of ship mentioned in the Act is whether the vessel be one whose real and habitual business is to go to sea, viz.:—*Ex parte* Ferguson, L.R., 6 Q.B. 280 (see opinion of Blackburn, J.), and *The C. S. Butler*, L.R., 4 Adm. and Eccl. 238 (see opinion of Sir R. Phillimore). Observations of the Lord Justice-Clerk (Moncreiff) in delivering judgment will be found quoted *ante*, p. 133.

The definition of a seaman given by his Lordship may, it is thought, require to be slightly modified in view of 17 and 18 Vict. c. 104, sec. 19, which, as it provides that "ships employed solely in navigation of the rivers or coasts of the United Kingdom" need not be registered, appears to contemplate the inclusion among ships of such as ply in rivers, and of the decision in

The *C. S. Butler (supra)*, where it was laid down by Sir R. Phillimore that a vessel whose real and habitual business is to go to sea is a ship though propelled by oars as well as sails.

*Hamilton v. Hyde Park Foundry Co.*, 1885, 22 S.L.R. 709, where a foreman labourer was held to be a workman within the meaning of the Act.

In England—*Grace v. Cawthorn*, H.C., 24th April, 1883, *De Colyar's County Court Cases*, 168; referred to, *Journal of Jurisprudence*, vol. xxviii., p. 110; where it was held that a fireman on board a steamer is a seaman within the meaning of sec. 13 of the Employers and Workmen Act, 1875, and therefore excluded from the operation of the present Act.

This case may be taken as overruling any authority which the case of *Wilson v. Zulueta*, 19 L.J.Q.B. 49, a case under the Stamp Act, 55 Geo. III. c. 184, may have had with reference to this point.

*Morgan v. London General Omnibus Co.*, 1884, 13 Q.B.D. 832, where it was held that an omnibus conductor, engaged at daily wages paid daily, is not a "person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the present Act. (See *supra*, p. 137.)

The ground of decision in this case was that "the real and substantial business" of an omnibus conductor "is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares." (Opinion of Brett M.R.)

The opinions in *Wilson v. Glasgow Tramway and Omnibus Co. (supra)* were dissented from.

The following quotation from the opinion of Brett M.R. upon the general principles of interpretation of

the definition seems worthy of notice :—" In the interpretation clause of both the Employers and Workmen Act, 1875, section 10, and the Employers' Liability Act, section 8, the word ' means ' is used ; this shows that the class of persons mentioned, and no others, were intended to be comprehended within the meaning of the Acts. The word ' otherwise ' used in the earlier enactment shows that the statutes were intended to apply only to those engaged in manual labour ; they do not extend to any other."

*" Has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."*

While it cannot be denied that it was the intention of the Employers' Liability Act, 1880, to deprive the employer in the cases to which it applies of the defence of " common employment," or " collaborateur," otherwise competent to him, it by no means follows that the Act will apply in all cases in which previous to its commencement that defence was competent. The Legislature in using the words " means any person to whom the Employers and Workmen Act, 1875, applies " has made it imperative to construe the interpretation clause of that Act with reference to the provisions of the Act in which it is contained. And notwithstanding expressions of opinion in *Morrison v. Baird & Co.*, 1882, 10 R. 271 (*infra*), and in *Morgan v. London General Omnibus Company*, 12 Q.B.D. 201 (per A. L. Smith J. and Day J., pp. 206, 207), it is submitted that to give to the words of the clause, in considering a case under the Employers' Liability Act,



1880, any wider or other interpretation than could be given to them in considering a case under the Act of 1875, is to make the Employers' Liability Act apply to persons to whom the Act of 1875 does not apply, *i.e.*, is to run directly counter to the words of section 8 of the Act of 1880. While, as has been indicated, sundry *obiter dicta* are on record which would seem to point to a different canon of interpretation, it is thought that none of the decisions which have been pronounced render it necessary to adopt a doctrine which in the opinion of the authors is unsound. The following are the decisions which have been pronounced upon the interpretation of this part of the section, viz.:—In Scotland—*Morrison v. Baird & Co.*, 1882, 10 R. 271. Here the widow of a miner who had been killed while working in a lime quarry, raised an action against the tenants of the quarry for damages, founding on the common law and on the Employers' Liability Act, 1880. The pursuer averred that the working of the quarry was carried on under the superintendence of a general and of an underground manager appointed by the defenders; that the defenders were in the habit of arranging with certain of their men to excavate portions of the limestone at a certain rate per ton, and authorizing them to employ the necessary workmen; that in all cases the defenders retained to themselves the whole control and supervision of the working, and of its various parts, and of all the men in the mine, and that all workmen in the mine formed one organization, and were subject to one general control exercised by the defenders; that at the date of the accident one of the faces of the pit was wrought under such an arrangement by J. M.; that the pursuer's husband was en-

gaged under J. M. as a workman; that while so employed he was killed by a fall of rock through the fault of the defenders, or of the general manager, or of the underground manager, or of J. M. The defenders pleaded that the Act did not apply, as (according to the pursuer's statement) the deceased was not a workman employed by the defenders; and that at common law the case was not relevant, as the injuries were alleged to have been caused by persons forming part of the organization of the mine. Held that the Act did apply, and therefore that the action was relevant.

Lord Young in delivering judgment said:—"The defenders' argument came to this, that a workman in the position of this workman must fall between two stools. At common law he is a workman to whom the doctrine of collaborateur applies, and if he is injured by any person in the employment of the head master, he will have no remedy, although that head master did not employ him, but a servant of that head master. . . . Now we know that the statute was introduced to afford a remedy against that rule in certain cases specified by the statute. But the defenders say, although you are within the rule of the common law, and therefore not entitled to the remedy of it, yet you are not within the remedy of the remedial statute, which ought to be considered as applying only where the employment is direct. . . . And that puts us to this,—whether the remedial statute is to be construed with reference to the mischief to be remedied, and the remedy made co-extensive with the mischief; in short, whether we should not support the pursuer's view upon a consideration of—1st, the rule of the common law; 2nd, the mischief involved in the

rule; and 3rd, the remedy provided by the Legislature for it. These are the three things to be considered in construing a remedial statute. And the aim is to construe the remedial statute liberally, so as to make it co-extensive with the mischief, and it was conceded that, if the words admitted of it, and we construed the statute liberally, the remedy would apply to the pursuer's case."

Lord Craighill said:—"The contention involves a paradox too strange to be sound. . . . I think the statute is to be so construed—so far as the words will admit—as to comprehend all grades of injury for which, presumably at least, a remedy was required."

While these opinions seem in some parts to indicate an opinion that the Act must apply to all cases in which previous to its commencement the defence of collaborateur was available to the employer, their scope is greatly modified by the qualification contained in the words "if the words admitted of it," and "so far as the words will admit" used by their Lordships; and it is thought that the decision is an authority for this proposition only, that a person working under such a contract as that of the deceased in this case is a person who is working under an implied contract with the head master within the meaning of sec. 10 of the Employers and Workmen Act, 1875. A reference to the opinion of Lord Rutherford-Clark shows that this is the view his Lordship took of the import of the decision.

*Robertson v. Russell*, 1885, 12 R. 634. In this case, a workman, who was working in the employment of a firm of pit sinkers, who had a contract with a mine owner to sink a shaft in his colliery to a lower

seam of coal, was killed by the falling in of the sides of the shaft, which had been insufficiently propped owing to the fault of the pit sinkers. The workmen engaged by the pit sinkers for the carrying out of their contract were paid by them, were under their sole control, and did not sign the colliery rules. The mine owner and his manager did not superintend the operation. The widow of the deceased raised this action against the mine owner both at common law and under the Act, and founded on the cases of *Woodhead v. Gartness Mineral Company* (1877, 4 R. 469), and *Morrison v. Baird & Company* (*supra*) to show that the workman was a servant of the mine owner. The Court held that these authorities were wholly inapplicable, and that the case was outside the scope of the Act.

Lord Young, who gave the leading opinion, made the following remarks as to the plea under the Act:—"I should like to repeat, however, that the Employers' Liability Act cannot possibly have any application to this case. That Act applies only to the removal in certain cases of a defence otherwise competent at common law. Where a man sues his employer or the representatives of a deceased workman sue his employer, the defence may be stated that the fault alleged as the ground of action was the fault of a collaborateur, and that the risk of that is upon the workman who suffered, and not upon the master. That defence, good at common law when the relation of collaborateur exists between the sufferer and the person at fault, is removed in certain cases by the Employers' Liability Act, which provides that in these cases the action shall lie just as if the relation of employer and em-

ployed did not exist between the parties ; and if the defence here had been that the fault which was the ground of action was the fault of a collaborateur, of a person who with the sufferer was in the common employment of the defender, the Employers' Liability Act might have been founded upon, but where this is not the defence, and the defence on the contrary is that the relation of employer and employed does not exist at all between the parties, so that there can be no collaborateur and no common employment, the Act which is intended to remove a defence, stated on the assumption that that relation does exist, cannot possibly apply."

The decision in this case it is thought confirms the view stated above as to the meaning to be attached to the decision in *Morrison v. Baird & Company*. The remark in the opinion above quoted, that "if the defence had been that the fault which was the ground of action was the fault of a collaborateur, then the Employers' Liability Act might have been acted upon," would appear to indicate the view that while in a case such as the above, where the defence of collaborateur is not stated, the employed cannot be held to fall within the meaning of the term "workman" in the Act, he might be held to do so if that defence were stated. If such an opinion was intended to be put forth, it is submitted that it cannot be regarded as sound. The question of whether a person is a workman under the Act or not must turn upon the existence of a contract express or implied between the employer and employed, and it is difficult to see how the nature of the defence stated can affect it. The defence of collaborateur, while it derives its name from



and has the clearest and most direct application to cases in which there is a contract of service between the injured man and the employer, is not, as it is thought is clear upon the authorities, founded upon any contract of service whatever, but rests upon this, that wherever the injury is one the risk of which the injured man, be he a servant of the master whom he sues or a member of the public, must from a consideration of the whole circumstances of the case be held to have taken upon himself, he is barred from any claim against the master.

In the leading case of *Woodhead*, the ratio of the doctrine is thus laid down by the Lord President:—"The mine owner is free from responsibility, not because the injured and the injurer are both his own hired and paid servants, but because he is not personally in fault, and has not warranted the injured workman against the perils of the work" (4 R. 478).

In the words of Lord Gifford in the same case (p. 506), the doctrine of *collaborateur* applies "to contractors and sub-contractors and their servants," to "every one who enters a pit, whether as a permitted visitor, actuated only by curiosity, or by love of science, or as a workman who accepts employment there"; and in the words of Lord Shand (p. 510), it applies not only to workmen but to "friends who visit them, members of a family or their guests or visitors, or any of the members, temporary or permanent, of any organization or establishment in which all, however variously occupied, are working towards one common end or purpose"; and the cases of *Wingate v. Monkland Iron Company*, 1884, 12 R. 91, where it was held to apply to the clerk of a firm of mining engineers who were employed

jointly by the landlord and lessees of a mine to make a periodical survey of the mine for purposes connected with the lease, and of *Maguire v. Russell*, 1885, 12 R. 1071, where A, a labourer in the employment of a firm who had contracted to lay the cement flooring of a building in course of erection, was injured by a hammer which fell through a skylight in the roof as was alleged by the fault of B, a workman in the employment of C, who had undertaken to execute the plumber work of the same building, and it was held, following *Woodhead*, that A and B being engaged in common work, C was not responsible to A for B's fault, show the extensive application which the Court is prepared to give to the doctrine—an application which it is submitted includes innumerable cases to which the Employers' and Workmen Act, 1875, could not possibly apply.

“The case of a master being liable for the fault or negligence of his servant is a very limited exception to the far more general and indeed almost universal rule that in cases of crime or delict or quasi delict or *culpa*, it is the person to blame who must alone bear the consequences” (per Lord Gifford in *Woodhead's* case, 4 R. at page 506). This exception has been extended by the Employers' Liability Act. But the extension is founded upon a contract express or implied between the employer and the employed, and by contract it can be taken away (*Griffiths v. Earl of Dudley*, 1882, 9 Q.B.D. 357). The following are the English authorities bearing on the interpretation of this part of the section, viz. :—

*Stuart v. Evans*, 1883, 49 L.T. 138. In this case the plaintiff's husband, S., was a slater. The defendant

was a builder, and had on several occasions employed S. to slate houses for him. The defendant provided the slates, poles, and scaffolding, but S. had his own tools, and was paid by the piece. At the time he was injured S. was working under such a contract with the defendant. Held that he was a "workman" within the meaning of the Act.

It does not appear from the report that S. contracted "personally to execute" the work, but he did as a matter of fact personally execute it, and evidently he was understood and known to be a working slater.

Williams J. says (p. 140):—"It was the case of an ordinary employment without any special terms of a workman who did the work himself, and who did not generally employ other persons to do the work for him."

*Lovell v. Charrington*, Law Times Newspaper, March 18, 1882, Q.B.D. In this case the plaintiff had been occasionally employed by the defendant as a trolleyman. On the day in question he arrived too late, and was told he could not be employed for that day. While leaving the premises he sustained the injury complained of owing to an alleged defect therein. Held that he was not a "workman" within the meaning of the Act.

*Cowler v. Moresby Coal Company, Ltd.*, Law Times Newspaper, July 4, 1885, Q.B.D. In this case the plaintiff had been in the employment of the defendants as a coal hewer or miner in their pit up till and including Saturday, 21st June, 1884. On applying for his wages on Saturday afternoon he was informed that he was discharged, and that before his wages could be paid he must, in accordance with

the rule of the pit, fetch his tools from the pit, and that he was to descend for that purpose on Monday morning. While in the pit on Monday morning he was injured by an explosion of fire-damp, which the jury found was due to defendants' fault. Held on special case stated by County Court Judge that the plaintiff was a "workman" within the meaning of the Act.

*Brown v. Butterley Coal Company and others*, 1886, 53 L.T. 964. In this case it was held that a butty collier not paid by the master but by the chief of his gang is a workman within the meaning of the Act, and the decision in *Morrison v. Baird & Company* (*supra*) was approved.

The case of *Willet v. Boote*, decided under the Act 4 Geo. IV., c. 34 (*supra*, p. 273), and the cases of *Riley v. Warden*, *Floyd v. Weaver*, *Sharman v. Sandars*, *Bowers v. Lovekin*, *Ingram v. Barnes*, *Sleman v. Barrett*, and *Pillar v. Llynvie Coal Company*, decided under the Truck Act (*supra*, pp. 276 *et seq.*), may also be referred as showing what was held to be a contract of service, or a contract personally to execute a work or labour under these Acts.

The following quotation from Mr. Justice Field's opinion in the case of *Griffiths v. Earl of Dudley*, 1882, 9 Q.B.D. 357, where the question was as to whether a workman could contract himself out of the Act, may also be referred to, where he says:—"The workman is obliged to rely upon the contract of service; but for that contract he would have no right of action at all; he is only entitled to be upon the employer's premises by virtue of it."

In the work of Messrs. Roberts and Wallace upon

the Duty and Liability of Employers (p. 226), the authors give it as their opinion that if the words in the section, "or works under a contract," are to have any meaning of their own, they must be taken to be intended to include cases where the workman is engaged in the employer's work, not under a contract with the employer, but under a contract with a third party—such cases, for instance, as that of a workman engaged by a third person who has contracted to work for the employer, as in *Indermaur v. Dames*, L.R. 2 C.P. 311, at least where the workmen are under the control of the principal employer, and cases where the servant of one person has been lent to another person, either for a limited time or for the purposes of a particular operation, as in *Rourke v. White Moss Colliery Company*, 2 C.P.D. 205 ; 46 L.J.C.P. 283; and *Murray v. Currie*, L.R. 6, C.P. 24 ; 40 L.J.C.P. 26.

Without entering into the question whether such cases will fall under the Act as implied contracts, which must, it is thought, be a question depending greatly on the circumstances of the particular case, it is thought that it is unnecessary to impute to the Legislature an intention to include these particular classes of cases in using the words "or works under a contract," as the necessity for using these words as the only words which could have a proper grammatical reference to the term "implied (contract)," which follow, the words "enters into" having reference to the term "express (contract)" seems sufficient to explain their existence in the clause.

The question which has to be faced under this clause of the section is, it is submitted, whether or not there exists between the injured and the employer



whom he seeks to render liable a contract of service or a contract personally to execute any work or labour express or implied. It is a question which is to be answered in a liberal spirit in view of the decisions which have been pronounced, but it is a question which must be answered in the affirmative if the pursuer is to succeed.

On the position under the Act of gratuitous assistants there is as yet no decision. It is thought that those acting by request of the master would fall within its scope as working under an implied contract, while other voluntary assistants would not.

As regards the words "in writing," there is a provision in England in the Statute of Frauds, 29 Car. II. c. 3, sec. 4, that writing is necessary in contracts which are not to be completed within a year; but as even in such cases it is held that so long as the servant is performing his duties with the master's assent he is working under an implied contract that he shall receive a reasonable remuneration for the work done, no question is likely to arise upon the absence of writing under the present Act (See *Britain v. Rossiter*, 11 Q.B.D. 123; 48 L.J., Q.B. 362; *Knowlman v. Bluett*, L.R. 9 Ex. 1, 307; 43 L.J., Ex. 29, 151).

The question as to what constitutes the relation of master and servant so as to make the master responsible to third parties for his servant's fault has, it is needless to say, received very full discussion in cases of that nature. It is thought, however, that the decisions upon this branch of the law cannot be founded upon as authorities in the present question. The question in these cases is not one between master and servant, but between one individual and another,

and the decisions proceed upon the principles of the common law as to the extent of the duties and liabilities of one individual to another, and do not depend upon the existence of a contract of service express or implied, or a contract personally to execute any work or labour between the actual wrong-doer and the person sought to be made liable, although the existence of such a contract is often an important element in the case. It is, therefore, not proposed to collect the cases upon this subject here. The reader will find them fully discussed in Fraser upon Master and Servant, 3rd ed., chap. xiii.

(1) *By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer.*

This sub-section must be read in connection with section 2, sub-section 1, which runs as follows, viz.:—

*“A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases: that is to say, (1) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.”*

The provisions of these clauses may be divided into two parts. In the first place, the common law as to the liability of employers for defects in ways, works, machinery, or plant is declared and enacted; and in the

second place, provisions are made extending that liability.

It has been laid down that the provisions of the Act while they may extend do not in any way detract from the master's liability at common law (*M'Avoy v. Young's Paraffin, etc., Company*, 1881, 19 S.L.R. 137, and 9 R. 100; *Morrison v. Baird & Co.*, 1882, 10 R. 271; *Dailly v. Beattie*, 1882, 20 S.L.R. 92). The effect of the provisions of these clauses, so far as they are declaratory of the common law, will therefore be to leave the common law as it stands.

As it is our purpose here rather to emphasize the points in which the law has been altered, we shall content ourselves with referring very shortly to the decisions which have settled the law of Scotland in this matter in accordance with the principle laid down in these clauses.

In the case of *Weems v. Mathieson*, 1861, 4 M'Queen 215, Paterson's App. 1044, the law was laid down by Lord Chancellor Campbell in these terms (M'Q. p. 222):—"To support that allegation (*i.e.*, the allegation of defender's negligence) it would be necessary not only to show that this machinery had been insufficient, but to show that this deficiency did not arise from any inherent secret defect, but that it was known, or might, by the exercise of due skill and attention, have been known to the defender, who was the employer of the deceased;" and by Lord Wensleydale in these terms (M'Q. p. 227):—"I take it to be perfectly clear that in these cases there is no warranty. All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his work-

men in a fit and proper manner." A dictum to the same effect will be found in Lord Mackenzie's opinion in the earlier case of *Sneddon v. Addie*, 1849, 11 D. 1159.

Subsequent cases have only amplified and illustrated the doctrine thus laid down by their Lordships in the House of Lords. Reference may be made to the cases *Ovington v. M'Vicar*, 1864, 2 Macph. 1066; to the opinion of Lord Chancellor Cairns in *Wilson v. Merry & Cunningham*, 1868, 6 Macph. H.L. 84 (at p. 89), 1 L.R.H.L. Sc. App. 326 (at p. 332), and *Stewart v. Coltness Iron Company*, 1877, 4 R. 952, and to the cases of *Gemmills v. Gourock Ropework Company*, 1861, 23 D. 425; *Traills v. Small & Boase*, 1873, 11 Macph. 888; *Gibb v. Crombie*, 1875, 2 R. 886; *Carty v. Nicoll*, 1878, 6 R. 194, which show that the question of defect must always be looked at relatively to the circumstances of the particular case. Reference may also be made to the English cases of *Potts v. Port-Carlisle Dock and Railway Company*, 2 L.T. 283; *Murphy v. Phillips*, 35 L.T. 477, and *Watting v. Oastler*, 6 L.R., Ex. 73; 40 L.J., Ex. 43.

Since the commencement of the Act the following decisions have been pronounced under these sub-sections, or under the cognate principle of the common law, viz.:—

In Scotland—*M'Monagle v. Baird & Co.*, 1881, 9 R. 364. In this case the fault founded on was that part of the main roadway of a pit was unsafe owing to the negligence of the oversman, whose duty it was to have it secured. The defence of working in the face of a known danger was repelled.

*Walker v. Olsen*, 1882, 9 R. 946 (*supra*, p. 47).

Fraser *v.* Fraser, 1882, 9 R. 896 (*supra*, p. 46).

Seeley *v.* Jackson & Sons, 1882, 20 S.L.R. 11 (*supra*, p. 186).

Ross *v.* Thomson & Co., 1882, 20 S.L.R. 46. In the circumstances of this case it was held that there was no fault on the part of the defenders in putting a child of ten to work at an unfenced machine.

M'Laughlin *v.* Colin Dunlop & Co. and another, 1882, 20 S.L.R. 271. In this case, which was an action of damages at the instance of a workman who had been killed by an accident (prior to the passing of the Act), which took place through the alleged defective condition of the plant used in the service of the employer, it was proved that the plant in question had been under the charge of a competent person, and that the employer had provided all sufficient materials and appliances for making any repairs which might be necessary. Held that, assuming the condition of the machinery to be defective, the employer was not liable in damages in respect that he had discharged all the obligations incumbent on him at common law.

Grant *v.* Drysdale, 1883, 10 R. 1159 (*supra*, p. 99).

Rooney *v.* Allans, 1883, 10 R. 1224 (*supra*, p. 55).

Waterston *v.* Murray & Co., 1884, 11 R. 1036. This was an action founded on the alleged defective condition of a gangway, which was dismissed as irrelevant in respect that there was no specific averment of the nature of the defect.

M'Farlane *v.* Thompson, 1884, 12 R. 232 (*supra*, p. 49).

Johnston *v.* Mitchell & Co., 1885, 22 S.L.R. 698. This was an action at the instance of an employé in a matchwork against his employer to recover damages



for injuries to his hand sustained in shutting a sliding door on the occasion of an alarm of fire. It was proved that the door in question was for the purpose of preventing fire communicating from one room to another, and that it was regularly closed at meal times and at night; that it was not usually the duty of the pursuer to shut the door, and that he had never done so until the day of the accident, when he did so in obedience to the order of the foreman; that the door was moved by means of a handle, but that there was no catch in the wall to stop the door, which in consequence ran on until brought up by the handle, and that a very small alteration would have made the door safe. Held in these circumstances that there was fault on the part of the defenders, and that the pursuer was entitled to damages.

*Irwin v. Dennystoun Forge Co.*, 1885, 22 S.L.R. 379. A workman was injured through the breaking of a bolt on which a heavy weight depended. It was proved that the bolt might have been expected to carry a much greater weight, but no latent defect in it was proved. It appeared that it might previously have been exposed to a very severe strain, and there was no evidence that the employer was in use to have the bolts used in the works tested at intervals. The Sheriff having decided that in these circumstances the employer was liable to the workman, the Court held that there was evidence for his judgment and refused to disturb it.

*Mitchell v. Coats Iron & Steel Co.*, 1885, 23 S.L.R. 108 (*supra*, p. 198).

*Mitchell v. Patullo*, 1885, 23 S.L.R. 207. A farm-servant claimed damages in respect that he had been in-

jured through a horse being frightened by the blowing to of a shed door, and that this would not have happened had the door been of a different construction and fastened with a sneck, instead of having something put against it to hold it. Held that there was no liability in respect (1) that a master is not bound to have the newest and most excellent appliances, but only to use reasonable precautions, and (2) that the cause of damage was too remote.

*Macleod v. Caledonian Railway Co.*, 1885, 23 S.L.R. 68. In an action of reparation at common law and under the Act by the personal representatives of a workman against an employer for personal injuries resulting in death, caused by the alleged insufficient state of the premises on which the workman was employed, averments, not amounting to an allegation that not only did the master know, but that the servant was ignorant of the danger, held relevant and sufficient to entitle the pursuer to an issue.

*Sharp v. Parkhead Spinning Co., Limited*, 1885, 12 R. 574 (*supra*, p. 61).

*Welsh v. Moir*, 1885, 12 R. 590 (*supra*, p. 59).

*Bowie v. Rankin & Co.*, 1886, 13 R. 981 (*supra*, p. 187).

The following decisions have been pronounced in England, viz.:—

*Robins v. Cubitt*, 1881, 46 L.T. 535. Circumstances in which in an action founded on section 1, sub-sections 1 and 2 of the Act, the Court assailed the defenders, the jury having found that there was no defect under sub-section 1, and that the accident was attributable to the fault of a workman who, in the opinion of the Court, had not any superintendence

entrusted to him within the meaning of subsection 2.

*Huxham v. Thoms*, 19th January, 1882, *Law Times Newspaper*, 28th January, 1882. This was an action for damages for the death of a workman who had been killed by falling off part of a scaffold called a runner, founded on the defective condition of the scaffold, in which the jury in the County Court found for the plaintiff, and an appeal was taken on the ground that there was no evidence of negligence. The Court declined to grant a rule. Field J. referred to *Scott v. St. Katherine's Dock Company* (3 H. and C. 596), where the marginal note runs—"Where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care," and remarked that under the old law there would have been a good defence to the action, but this was just one of those cases within the meaning of the Act which the Legislature passed to alter the existing law.

*M. Giffin v. Palmer's Shipbuilding & Iron Company, Limited*, 1882, 10 Q.B.D. 5 ; 52 L.J.Q.B. 25 (*supra*, p. 196).

*Heske v. Samuelson*, 1883, 12 Q.B.D. 30 ; 53 L.J.Q.B. 45 (*supra*, p. 200). See opinion of Coleridge C.J.

*Cripps v. Judge*, 1884, 13 Q.B.D. 583. The plaintiff, a workman in the defendants' employment, was injured by reason of the breaking of a ladder which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being

used, and the scaffold and ladder were placed and were being used under the directions of one of the defendants. Held that there were evidence under sec. 1 sub-sec. 1 of the Act to go to the jury.

Brett M.R. quoted with approval the opinion of Coleridge C.J. in *Heske v. Samuelson* (*supra*).

*Griffiths v. London and St. Katherine's Dock Company*, 1884, 13 Q.B.D. 259; 53 L.J.Q.B. 504. In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger. But see *Macleod v. Caledonian Railway Company*, 1885, 23 S.L.R. 68 (*supra*, p. 299).

*Jones v. Burford*, Q.B.D., 6th December, 1884, 1 Times Law Reports, 137. In this case it was held that a ladder borrowed without the employer's authority formed no part of his plant, and that he incurred no liability in respect of it.

*Allmarch v. Walker*, Q.B.D., Law Times Newspaper, March 28, 1885, p. 391. In this case the defendant was held not liable for injuries caused to a workman by an alleged defect in a cart which had been hired for the purpose for which it was used.

*Martin v. Connahs Quay Alkali Company*, 1885, 33 W.R. 216 (*infra*, p. 312).

*Paley v. Garnett*, 1885, 16 Q.B.D. 52. The plaintiff, a lad of nineteen, was employed in the defendant's paper mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter, but the roller being in several pieces or sections, with interstices between them, into which the

jute sometimes got and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who, to remedy it, procured a roller in one piece, but the accident happened before the new roller was placed. The maker swore that with care both rollers were equally safe. The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants and not removed by them, *held* that this finding was warranted by the evidence.

Kiddle *v.* Lovett, 1885, 16 Q.B.D. 605 (*supra*, p. 205).

Pegram *v.* Dixon, 9th July, 1886, 55 L.J.Q.B. 447 (*supra*, p. 209).

Weblin *v.* Ballard, 1886, 17 Q.B.D. 122 (*supra*, p. 201).

Howe *v.* Finch, 1886, 17 Q.B.D. 187 (*supra*, p. 203).

Thomas *v.* Quatermaine, 1886, 17 Q.B.D. 414 (*supra*, p. 202).

The following decisions in the Sheriff Court may also be referred to, viz. :—

Simpson *v.* Arrol, 1886, 1 Sheriff Court Reporter 126 (Sheriff-Substitute Cheyne). Circumstances in which employers were held liable in damages to the widow of a workman who was drowned by falling off a pontoon, upon which he was working in a tidal river, and which was not protected by a railing.

Foy *v.* Addie, 1885, 2 Sheriff Court Reporter 35 (Sheriff-Substitute Lees and Sheriff Clark). Held that the absence of shuts does not constitute a defect in the condition of a cage in a pit.



Goldie *v.* Biggarts, 1886, 2 Sheriff Court Reporter 213, 424 (Sheriff-Substitute Hall and Sheriff Brand). Circumstances in which held that certain machinery did not require to be fenced under sec. 5 of the Factory and Workshops Act, 1878 (41 Vict. cap. 16), and that there was therefore no defect in the condition of the machinery.

Kirk *v.* Owens, 1886, 2 Sheriff Court Reporter 426 (Sheriff-Substitute Orr Paterson and Sheriff Brand). Held that where an accident occurs to a workman through his employing tackle for a purpose for which it was not intended, and for which it proved to be insufficient, his employer is not liable in damages.

(2) *By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence.*

As defined by section 8, the expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour.

The following decisions have been pronounced under this sub-section, viz.:—

In Scotland—Seeley *v.* Jackson & Sons, 1882, 20 S.L.R. 11 (*supra*, p. 186).

Bowie *v.* Rankin & Co., 1886, 13 R. 981 (*supra*, p. 187).

Cook *v.* Stark, 1886, 14 R. 1. Held that, while the manager of a work may delegate to others the ordinary operations in use in the work, yet it is his duty to give his personal super-

intendence to an operation which is dangerous and unprecedented, and his failure to do so will, in the event of an accident, amount to such culpa as will render his master liable in damages under the Act.

A workman in a quarry, who had been sent by the manager to assist an experienced man who had been engaged for half an hour in attempting to draw an unexploded charge of gunpowder from a rock, used for the purpose a steel "jumper," which generated sparks on striking the rock, thereby causing an explosion which injured him. Held that he was not guilty of contributory negligence, inasmuch as the use of the tool was not so obviously dangerous as to render him inexcusable in using it.

M'Inally *v.* King and others, 1886, 14 R. 8. A workman was killed by the fall of a bank of clay which he was engaged in undermining. It was held on a proof that the accident was due to the absence of a watchman to warn the workmen of signs of a fall, and that the failure to have such a watchman constituted a fault on the part of the defenders' foreman, for which they were liable in compensation to the father of the deceased workman. A plea of contributory negligence was repelled.

In England—Robins *v.* Cubitt, 1881, 46 L.T. 535 (*supra*, p. 299).

Shaffers *v.* General Steam Navigation Co., 1883, 10 Q.B.D. 356; 52 L.J.Q.B. 260 (*supra*, p. 224).

Osborne *v.* Jackson, 1883, 11 Q.B.D. 619 (*supra*, p. 226).

Kearney *v.* Nicholls, Nov. 5 and 8, 1883, Law Times Newspaper, Nov. 24, 1883. In this case it was held by Denman J. that the provisions of this sub-

section cover a case where injury is caused to a workman through the negligence of a person entrusted with superintendence, although such superintendence be in another department of the work.

*Hall v. North Eastern Railway Co.*, 1 Times Law Reports 359. In this case it was held that a merely nominal control of the working of some machine used in the business does not constitute superintendence within the meaning of this section.

The following decisions in the Sheriff Court may also be referred to, viz.:—

*M'Partland v. Campbell*, 1884, 1 Sheriff Court Reporter 9 (S.S. Lees). A labourer employed in removing a large vat from one part of the defenders' works to another was killed by the vat falling upon him. Held that in the circumstances disclosed reasonable precautions had not been taken by defenders' manager against danger, and that the defenders were therefore liable in damages.

*Foy v. Addie & Sons*, 1885, 2 Sheriff Court Reporter 35 (S.S. Lees and Sheriff Clark). Query, Whether the engineman who works the engine connected with a cage for ascending and descending a pit is a person who has superintendence entrusted to him within the meaning of section 1 sub-section 2.

*Morrison v. The Distillers Co., Limited*, 1885, 2 Sheriff Court Reporter 52 (S.S. Guthrie and Sheriff Clark). A foreman failed to give sufficient warning to a workman of a danger to which he would be exposed in the course of his work, in consequence of which the workman exposed himself to the danger and was injured. Held that the employers were liable in damages.

Sub-section (3) is framed to meet the case of persons entitled to give orders who do not fall within the definition of "persons who have superintendence entrusted to them"; a reference to the cases under that sub-section will show what class of persons the courts are disposed to exclude from the operation of this sub-section as not falling within the above definition.

(3) *By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed;*

The following decisions have been pronounced under this sub-section, viz.:—

In Scotland—*M'Manus v. Hay*, 1882, 9 R. 425. In this case the workman was injured by the fall of a heavy piece of machinery which he was assisting to lift in compliance with the orders of the foreman, to whose orders he was bound to conform and did conform. In the circumstances the Court held that there had been no actionable negligence on the part of the foreman either in the order given or in its execution.

The following passage from the note of the Sheriff (now Lord Trayner) is worthy of notice, as it deals with a point upon which no decision has yet been pronounced, at least in Scotland. After narrating that it was said that the foreman had committed an act of negligence while the operation was being carried out, he says:—"I think in the first place, on a view of the whole evidence, that this is not proved; and in the second place, if it were proved, I should have had difficulty in holding that such an act was 'negligence' in the sense of sub-section 3 of section 1 of the Act. The

negligence there treated of appears to me to be negligence in reference to the order given."

It may be here noted further that the defence was stated in the Sheriff Court that the foreman in ordering the pursuer to engage in the work in which he was injured had ordered him to engage in work which it was no part of the defender's duty to do in a question between him and the persons with whom he had contracted, and that the order was therefore not one to which the pursuer was bound to conform; but this defence was abandoned in the Court of Session as untenable, on the ground that the pursuer was not bound to know and did not know the terms of the contract between his employer and third parties, and that he did conform to the order.

Mitchell v. Coats Iron & Steel Co., 1885, 23 S.L.R. 108 (*supra*, p. 198).

Dolan v. Anderson & Lyall, 1885, 12 R. 804 (*supra*, p. 232).

Sweeney v. McGilvray, 1886, 14 R. 105. Where a superior servant, having the master's authority to give orders to other servants, gives an order and negligently fails to take reasonable precautions whereby it may be safely carried out, the master will be responsible under the Act.

The pursuer was engaged as a labourer in the employment of the defender, a plasterer, in laying the premises of a tramway company with concrete. It was the duty of the tramway company under their contract with defender to clear away their cars from the premises so as to allow the defender's men to begin work at seven in the morning. As they had failed to do this, the defender's foreman labourer, who



was a person to whose orders pursuer was bound to conform, ordered the workmen under him, including the pursuer, to attend at ten minutes before seven for the purpose of clearing away the cars. While engaged in the operation the pursuer had his arm broken by a car which had been pushed against him from behind by the foreman. It was contended for the defender that the order was not one to which the pursuer was bound to conform, as it was an order to engage in an operation which was no part of defender's business, and before the pursuer's regular hours of employment commenced, and that the negligence which led to the accident not being in the order but in the acts of the foreman in his capacity of manual labourer, the defender was not liable under the Act. Held (diss. Lord Craighill) that the order was one to which pursuer was bound to conform, and did conform, and that the injury having resulted from the foreman's failure to take reasonable precautions against danger in the operation, the defender was liable to make compensation to the pursuer under the Act.

*Kettlewell v. Paterson & Company*, 1886, 24 S.L.R. 95. A working glazier, who had been supplied by his employer (who had a contract to do the glazier work at a building) with suitable scaffolding, was directed by his foreman to facilitate his work by making use of another scaffold, which had been erected by the foreman of the person who had the contract for the joiner work. The scaffold gave way owing to the joiner having carelessly constructed it of defective material, and the glazier was injured. Held that as the scaffold had been erected by a competent workman, and as it had not been shown that the defect was one which

could have been observed by any such examination as the foreman glazier was bound to make, there was not such negligence in the order given by him as to render the employer of the injured man liable in damages.

In England—*Bunker v. Midland Railway Company*, 1882, 47 L.T. 476 (*supra*, p. 237).

*Millward v. Midland Railway Company*, 1884, 14 Q.B.D. 68 (*supra*, p. 236).

*Brown v. The Butterley Coal Company and others*, 1886, 53 L.T. 964. In the circumstances of this case the person in fault was held not to be a person to whose orders the injured man was bound to conform.

The following decisions in the Sheriff Court may also be referred to, viz. :—

*Croll v. Arrol*, 1884, 1 Sheriff Court Reporter 14 (before S.S. Cheyne). Circumstances in which held that no liability had been established against the defenders under sec. 1 sub-sec. 3 of the Act, the injury being the result of a pure accident.

*O'Donnell v. Braddock & Matthews*, 1885, 2 Sheriff Court Reporter 13 (S.S. Mair and S. Clark). Circumstances in which fault was held to be established on the part of a person to whose orders a workman was bound to conform, in respect he had ordered the workman, a boy of twelve years, to engage in work of too dangerous a character for a boy of his years.

(4) *By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ;*

This sub-section is to be read along with sec. 2 sub-sec. 2.

As to the effect of defective rules at common law see *Vose v. Lancashire and Yorkshire Railway Company*, 27 L.J., Ex. 249.

There have been no decisions under this sub-section.

(5) *By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway;*

There have been no decisions in Scotland under this sub-section.

In England the following decisions have been pronounced, viz.:—

*Cox v. Great Western Railway Company*, 1882, 9 Q.B.D. 106 (*supra*, p. 252).

*Doughty v. Firbank*, 1883, 10 Q.B.D. 358; 52 L.J.Q.B. 480 (*supra*, p. 249).

*Murphy v. Wilson*, 1883, 52 L.J.Q.B. 524 (*supra*, p. 251).

*Gibbs v. Great Western Railway Company*, 1883, 11 Q.B.D. 22; *affd.* 1884, 12 Q.B.D. 208; 53 L.J.Q.B. 543 (*supra*, p. 250).

It is not thought necessary here to refer to the various Acts of Parliament and decisions in which the words used in this section have been defined, with reference to matters wholly different from the matter in hand. It is clear from the cases cited that the principle upon which the Courts will proceed in interpreting this sub-section is to give to the words used their ordinary and popular meaning, having regard to the mischief which the sub-section was intended to

remedy. No weight has been attached by the Court in the cases cited to such Acts and decisions.

*—the workman, or, in case the injury results in death, the legal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.*

In this clause the rights of the workman against his employer are defined by means of a hypothesis which must be contrary to the facts of every case to which it is applied, or, in other words, to apply which strictly would have the effect of excluding from the case the very facts on which it depends.

To apply the hypothesis strictly to the case of a workman injured while engaged in his employer's work, the Court would have to consider him either as a trespasser upon the employer's premises without right or title, in which case his remedies would be lost, or as not being upon the employer's premises at all, in which case the whole facts and circumstances out of which the accident arose would be removed from view.

It can easily be shown that any attempt to deal with the clause in such a way leads to inextricable confusion. In the opinion of Wills J. in *Thomas v. Quatermaine*, 1886, 17 Q.B.D. 414, will be found what that learned Judge designates as "samples of the difficulty of applying an incomplete hypothesis to a state of facts which really negatives the hypothesis."

The Courts have accordingly not so dealt with the clause, but have endeavoured to find to what effect the Legislature intended the hypothesis to apply, with the

result that they have held that the intention, in using this hypothesis, was to remove from the employer a defence or defences formerly competent to him.

The point has been dealt with in Scotland in the following cases, viz. :—

*M'Avoy v. Young's Paraffin Company*, 1881, 9 R. 100 ; *Morrison v. Baird & Company*, 1882, 10 R. 271 ; and *Robertson v. Russell*, 1885, 12 R. 634, it being laid down in these cases that the effect of the statute is to remove the defence of collaborateur in the cases therein specified, leaving to the employer all other defences formerly competent to him. Special reference may be made to the opinion of Lord Young in *Morrison v. Baird & Company* (*supra*, p. 125 and p. 284).

The English Courts have gone farther, and have held that not only is the defence of collaborateur removed, but also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement.

The following are the English cases, viz. :—

*Stuart v. Evans*, 1883, 49 L.T. 138 (see *supra*, p. 289). It was laid down in this case that the defence of contributory negligence is still open to the employer, and is not affected by section 2 sub-section 3.

*Martin v. Connahs Quay Alkali Company*, 1885, 33 W.R. 216. A waggon was in a defective state, of which a workman was aware, and he used it in such a way as to cause injury to himself, when he knew how to use it and might have used it so as not to cause injury to himself. Held that he could not recover under the Act.

*Weblin v. Ballard*, 1886, 17 Q.B.D. 122 (*supra*, p. 126). In this case it was held that the effect of the



clause is "that the defence of contributory negligence is still open to the employer, but the defence of common employment, and also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement, are taken away from him when sued by a workman under the Act" (per A. L. Smith and Mathew J.J.).

*Thomas v. Quatermaine*, 1886 , 17 Q.B.D. 414 (*supra*, p. 202). In this case Wills J., while recognizing the authority of the decision in *Weblin v. Ballard* (*supra*), comments upon it on the ground that the result of it is to place the servant not in the same position as a stranger, but in a better position.

The point dealt with in *Weblin v. Ballard* (*supra*) has not been raised in any case in Scotland.

The Scotch Courts, as has been said, however, have taken the same general view of the way in which this clause is to be interpreted, viz., with reference to the master's defence. The defence to which their attention has been specially directed is that of common employment. But as the defence that the servant has contracted to take upon himself the known risks attending upon the engagement is equally with that of common employment a special defence available to a master as against his servant, but not available against a member of the public, the dicta of our Courts in regard to the defence of common employment would seem by parity of reasoning to be capable of being made to include that of known risk (see *Fraser, Master and Servant*, 3rd ed., pp. 220, 221). Nor are there any decisions in Scotland since the Act which preclude our Courts from adopting this view.

The only case in which, since the Act, the defence

of known danger has been sustained is the case of *McGee v. Eglinton Iron Co.*, 1882, 10 R. 955 (*supra*, p. 97), and that was a case at common law alone.

In the case of *M'Monagle v. Baird & Co.*, 1881, 9 R. 364 (*supra*, p. 109), it was stated, but not sustained in the special circumstances of the case.

In *Wilson v. Wishaw Coal Co.*, 1883, 10 R. 1021 (*supra*, p. 98), the existence of a known danger was established, but the Court assolizied the defenders, not on that ground, but on the ground that the pursuer had been guilty of contributory negligence in recklessly incurring that danger. Further, although there was a plea under the Act in this case, it does not appear that a valid notice was proved, and the case was treated throughout as one at common law.

In *Grant v. Drysdale*, 1883, 10 R. 1159 (*supra*, p. 99), the Court treated the case as one in which the employer could not plead acceptance of the risk, but to defend himself would require to show that the workman had been guilty of contributory negligence in the way he had acted in view of its existence (the employer himself having deponed that there was no danger in the circumstances apart from negligence on the part of the workman), and finding that such defence had not been established, held the master liable.

It is to be observed, however, that, while it is held in England, and would probably be held in Scotland, that the effect of this clause is to abolish in cases under the Act the defence of known danger, the defence of contributory negligence exists as before, the known existence of a danger not absolving the workman from the necessity of using reasonable care for his own safety in view of its existence, but rather putting him

on his guard to use additional care. The cases of *Wilson v. Wishaw Coal Co.* (*supra*) and *Martin v. Connahs Quay Alkali Co.* (*supra*) are good examples of this.

Further, it is to be kept in mind that a new defence has been provided for the employer in such cases by sec. 2 sub-sec. 3.

The words "the legal representatives of the workman and any person entitled in case of death" refer us back to the previously existing law for their meaning. The section does not confer a title to sue upon any new class of persons. Its effect is to entitle those persons who could obtain compensation in case of death at common law to obtain it under the Act.

The right to compensation on the part of personal representatives and others is regulated by the common law in Scotland, and in England by Lord Campbell's Act, 9 and 10 Vict. c. 93, amended by 27 and 28 Vict. c. 95.

In Scotland, a claim of damages and *solatium* on account of bodily injury or other cause "vests *ipso jure* and *ipso facto* by the commission of the injury, and, being a debt, transmits to the personal representatives of the sufferer." Bell's Principles, sec. 546 (eighth edition); *Milne v. Gauld's Trustees*, 1841, 3 D. 345; *Mein v. M'Call*, 1844, 5 D. 1112; *Neilson v. Rodger*, 1853, 16 D. 325; *Auld v. Shairp*, 1874, 2 R. 191; *M'Master v. Caledonian Railway Co.*, 1885, 13 R. 252; see, however, opinions in *Wights v. Burns*, 1883, 11 R. 217.

It is to be observed that the use in the section of the words "in case the injury results in death" would

appear to exclude the representatives of the deceased from a claim under the Act where death results from other causes. (See Fraser, Master and Servant, 3rd ed., p. 219.)

A claim also exists in their own right for damages and *solatium* in respect of injury resulting in death in a husband for the death of his wife and *vice versa* (Dow v. Brown, 1844, 6 D. 534, *supra*, p. 148), and in a parent for the death of a child or other descendant and *vice versa*; but not in a sister for the death of her brother (Eisten v. North British Railway Co., 1870, 8 Macph.; 980, *supra*, p. 147; Fraser, Master and Servant, 3rd ed., p. 218).

The various authorities upon the interpretation of Lord Campbell's Act and the Amending Act will be found collected in Roberts and Wallace on the Duty and Liability of Employers, 3rd ed., p. 407 *et seq.*

There has been only one decision upon the rights of representatives under this clause, viz.:—Griffiths v. Earl of Dudley, 1882, 9 Q.B.D. 357 (*supra*, pp. 143, 144), where it was held that the widow of a workman who had contracted himself out of the Act was bound by the contract.

The point has not been raised in Scotland. Reference is made to p. 146 *et seq.*, where the question is discussed with reference to the law of Scotland.

2. *A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,*

(1) *Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the*

*employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.*

This sub-section has been already noticed in connection with section 1 sub-section 1, to which reference is made.

(2) *Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of Her Majesty's principal Secretaries of State or by the Board of Trade, or any other Department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law.*

See section 1 sub-section 4, to which this section is a rider.

(3) *In any case where the workman knew of the defect or negligence which caused his injury and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer, or such superior, already knew of the said defect or negligence.*

This section gives a new defence to the employer in actions under the Act, in substitution for the defences removed from him by the Act, viz.:—the defence of common employment, and the defence that the work-



man has undertaken the known risks incident to his engagement. (See cases under section 1, last clause.) It does not affect the defence of contributory negligence.

Fraser, Husband and Wife, 3rd ed., pp. 220, 221.

Stewart v. Evans, 1883, 49 L.T. 138 (*supra*, pp. 289, 312).

Weblin v. Ballard, 1886, 17 Q.B.D. 122 (*supra*, p. 126).

Thomas v. Quatermaine, 1886, 17 Q.B.D. 414 (*supra*, p. 202).

3. *The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.*

The only decision upon the interpretation of this section is—

Bortick v. Head, Wrightson & Co., 1886, 53 L.T. 909. The plaintiff sued the defendants under the Act. The jury assessed the damages found for the plaintiff under different heads—in respect of wages earned from the defendants and in respect of wages earned overtime from another employer. The two sums combined did not amount to the maximum sum authorized by section 3 of the Act.

The County Court Judge held that the plaintiff was entitled only to the amount found due in respect of the wages earned in the defendants' service.

Held (reversing the decision of the County Court Judge) that the plaintiff was entitled to both amounts found for him by the jury, and that section 3 of the Act did not lay down a measure of damages, but merely limited the maximum damages recoverable under the Act. The following Sheriff Court cases may also be referred to, viz.:—

M'Partland *v.* Campbell, 1884, 1 Sheriff Court Reporter 9 (before S.S. Lees). Damages were awarded for the death of a man who had left a widow and two young children. The widow was allowed one half of the statutory damages, the other half being reserved for the children when they came to sue.

Simpson *v.* Arrol, 1885, 1 Sheriff Court Reporter 126. The same course followed in case where deceased had left a widow and one child, and the action was at the instance of the widow alone.

*4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for such want of notice.*

The following decisions have been pronounced under this section, viz.:—

In Scotland—Johnston *v.* Shaw, 1883, 21 S.L.R., 246 (*supra*, p. 159).

Clark *v.* Adams, 1885, 12 R. 1,092. In this case it was laid down that the limitation of time within which action must be raised is peremptory, and that the Court has no discretion, even where there is hardship, and held in the circumstances of the case that it was incompetent to convert an action at common law into one under the Act after six months on discovering that notice had been given.

M'Donagh *v.* P. & W. MacLellan, 1886, 13 R. 1,000 (*supra*, p. 155).

"The Judge" mentioned in this section is presumably the Judge who tries the action, as he is more particularly defined in sec. 7, clause 5.

As to the method in which time is to be computed under this section see Fraser on Master and Servant, 3rd ed., pp. 242, 243; and Roberts and Wallace, Duty and Liability of Employers, 3rd ed., p. 315.

The general rules are:—

(1) The *terminus a quo* is midnight of the day of the accident, that day being excluded from the computation.

(2) Weeks are to be reduced to days, reckoning seven per week.

(3) Months mean calendar months, the period expiring on the day of the same numerical denomination as that on which the accident happened, or if there be not such a day by reason of the month being shorter than that in which the accident happened, then on the last day of that month.

(4) The maxim *Dies inceptus pro completo habetur* does not apply.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a

*workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty, or part of a penalty, which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action ; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any person claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty, or part of a penalty, under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or persons shall not be entitled thereafter to receive any penalty, or part of a penalty, under any other Act of Parliament in respect of the same cause of action.*

There have been no decisions under this section.

6. (1) *Every action for recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of either plaintiff or defendant, be removed into a Superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed.*

(2) *Upon the trial of any such action in a County Court before a Judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.*

(3) *For the purpose of regulating the conditions*

*and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a County Court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in County Courts.*

*“County Court” shall with respect to Scotland mean the “Sheriff Court,” and shall with respect to Ireland mean the “Civil Bill Court.”*

*In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, sec. 9 of the Sheriff Courts (Scotland) Act, 1877. In Scotland the Sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.*

The effect of this section as regards removal of actions in England is commented on in Roberts and Wallace upon the Duty and Liability of Employers, p. 328 *et seq.*, and the rules made under sub-section 3 will be found set forth in Appendix E, and commented on at p. 335 *et seq.* of the same work.

Sub-section 1 can have no application in Scotland unless it be held to apply to the removal of actions by way of appeal for jury trial under 6 Geo. IV. cap. 120 sec. 40, and 31 and 32 Vict. cap. 100 sec. 73. But these statutes have been held to apply to actions under the Act irrespective of any provision. *Paton v.*



Niddrie and Benhar Coal Company, 1885, 12 R. 538.

No rules have been made in Scotland under subsection 3.

The reference to the Sheriff Court Act, 1877, is 40 and 41 Vict. cap. 50.

In Scotland the following decisions have been pronounced under this section and relative to procedure generally in actions under the Act :—

*M'Avoy v. Young's Paraffin Company*, 1881, 9 R. 100, where it was held (revg. Lord Lee) that the provisions of the statutes 59 Geo. III. cap. 35 (Jury Trials Act, 1819) section 1, and 6 Geo. IV. cap. 120 (Judicature Act, 1825), section 28, as to actions on account of injuries to the person, applied to actions in which the provisions of the Act are founded on, with precisely the same force as to actions at common law.

Question (per Lord Young) whether if in an action in the Court of Session it should appear that the only ground of action was one arising under the Act, which enacts that all actions under it are to be brought in the Sheriff Court, the action would fall to be dismissed.

*M'Avoy v. Young's Paraffin Company*, 1881, 19 S.L.R. 137 (a later stage of the same case). At adjustment of issues the defenders maintained that pursuers were only entitled to an issue under the Act, the case having been removed under this section, or at all events that there must be a separate issue at common law. Held (by Lord Lee, Ordinary) that the whole action was removed and that only one issue was required.

*Dailly v. Beattie & Sons*, 1882, 20 S.L.R. 92.

*Morrison v. Baird & Company*, 1882, 10 R. 271

(*supra*, p. 125), where the same was laid down by the Inner House.

*Magee v. Dalglish, Falconer & Company*, 1884, 11 R. 857, where the Court (First Division) approved of an issue in an action laid alternatively at common law and under the Act, which concluded with the words, "Damages laid at common law at £1,000, or under the Employers' Liability Act at £70 4s."

*Paton v. Niddrie and Benhar Coal Company*, 1885, 12 R. 538, where it was held that this section, by providing for transmission of actions, in the manner provided by, and subject to the conditions prescribed by section 9 of the Sheriff Courts Act, 1877, does not by implication abolish the right of either party under the 40th section of the Judicature Act, 1825, to have the cause removed to the Court of Session, with a view to jury trial, after an order for proof has been pronounced.

*Murray v. Steel & Sons*, 1885, 12 R. 945. This was an action of damages for personal injury under the Act and at common law, which was appealed by the pursuer for jury trial. The presiding Judge directed the jury that there was no case at common law. The jury found a verdict for the pursuer for £150, explaining that they proceeded on the Act alone. When the pursuer moved for expenses, the defenders, founding upon this section and upon the Sheriff Courts Act, 1877, section 9, craved that there should accompany the finding an instruction to the auditor to tax the expenses on the Sheriff Court scale. The Court refused the defenders' motion, holding that there was nothing to take the case out of the ordinary rule as to expenses.

*Gillon v. Ramage & Ferguson*, 1885, 12 R. 1192.

This was an action of damages for personal injury (at common law and under the Act) in which the pursuer averred that he had received injuries in the defenders' shipbuilding yard through the fault of the defenders while in their employment, or in the employment of parties who had contracted with them to do the piece of work on which the pursuer was engaged at the time he received the injuries. The fault alleged was in respect to the defective condition of the barrel of a winch by which iron plates were being lowered into the vessel, said winch being supplied by defenders, or in respect of an improper mode of conducting the work. The pursuer proposed the issue, "Whether the pursuer, while working in the defenders' works, Leith Docks, was, on or about 10th February, 1885, injured by the fall of certain plates through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The defenders objected, citing *Morrison v. Baird & Company* (*supra*), and proposed that it should read "Whether the pursuer, while working in the employment of the defenders in their works at Leith Docks," etc.

The Court approved of the issue.

*M'Donagh v. P. & W. MacLellan*, 1886, 13 R. 1000. A workman who had been injured when engaged in his employers' work, and had through his law agent sent a notice of injury to his employers under the Act without consulting his law agent, signed a document which bore that he had received £8 "as full compensation" for his injuries. In an action brought subsequently by the workman against his employers for damages on account of the accident, held that the receipt was no

bar to the pursuer's claim (if he repaid the £8), the Court being satisfied on the evidence that the pursuer did not understand that in signing the receipt he was discharging his claim in full.

This was an appeal from the Sheriff Court, where the action, both at common law and under the Act, had been dismissed without proof on the merits. The Court being of opinion as above that the action at common law ought not to have been dismissed (the dismissal of the action, so far as under the Act, being sustained in respect of want of timeous notice), held that the action need not be remitted to the Sheriff Court for further procedure, and ordered issues for the trial of the cause.

*7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there be more than one employer, upon one of such employers.*

*The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.*

*The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business ; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post ; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.*

*Where the employer is a body of persons, corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter*

*addressed to the office, or if there be more than one office, any one of the offices of such body.*

*A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.*

The following decisions have been pronounced under this section, viz.:—

In Scotland—Thomson *v.* Robertson, 1884, 12 R. 121 (*supra*, p. 162).

M'Govan *v.* Tancred, Arrol & Co., 1886, 13 R. 1033 (*supra*, p. 156).

In England—Moyle *v.* Jenkins, 1881, 8 Q.B.D. 116. In this case it was held that the notice must be in writing.

Keen *v.* Millwall Dock Co., 1882, 8 Q.B.D. 482. In this case the following notice was held insufficient, viz.:—7th June, 1881. I am instructed by George Keen, of 136 Rhodeswell, Limehouse, to apply to you for compensation for injuries received at your dock, particulars of which have already been communicated to your superintendent. I shall be glad to hear from you on the subject.—Yours faithfully, Henry Bradley.”

The communication referred to was not in writing.

Held that a notice must be in writing.

Opinion, per Coleridge C.J., that an incomplete notice cannot be supplemented by reference to another document, not concurred in by Brett L.J. and Holker L.J.

Stone *v.* Hyde, 1882, 9 Q.B.D. 76. In this case it was held that a notice need not be expressed in strictly



technical language. It is enough if it substantially conveys to the mind of the person to whom it is given the name and address of the person injured, and the cause and date of the injury.

A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at an hospital "for injury to his leg." Held that, having regard to the proviso at the end of section 7, the defect in the notice did not render it invalid.

*Clarkson v. Musgrave*, 1882, 9 Q.B.D. 386. The plaintiff's notice stated that she was injured in consequence of the defendants' negligence in leaving a certain hoist in their warehouse unprotected, whereby her foot was caught in the casement of the hoist and crushed. At the trial the jury found that the accident occurred through the negligence of a superintendent in the warehouse in allowing the plaintiff, a young girl, to go in the hoist alone; held that the notice of action sufficiently stated the "cause of the injury" within the meaning of section 7.

Laid down, per Field J., that the "cause of injury" does not mean the cause legally but the cause actually (p. 390), and, per Cave J. (p. 392), that the notice is not required to state the cause of action, but only the cause of injury.

*Adams v. Nightingale*, Law Times newspaper, 15th April, 1882. Held that notice must be delivered in such a manner that it may be reasonably presumed that it will come safely into the hands of the employer, or proof be given that notice was as matter of fact received.

*Carter v. Drysdale*, 1883, 12 Q.B.D. 91. A notice of injury omitted to state the date of the injury, and

the judge at the trial found that the defendant was not prejudiced in his defence by the omission, and that it was not for the purpose of misleading; held that the omission was a "defect or inaccuracy" in the notice within the meaning of section 7, and therefore did not render the notice invalid.

*Dunn v. Butler*, 1 Times Law Reports 476. A wrong address does not vitiate a notice if it reach the proper person, that being a "defect or inaccuracy" within the meaning of the section.

The following Sheriff Court cases may also be referred to, viz.:—*Simpson v. Arrol*, 1885, 1 Sheriff Court Reporter 126. *Devany v. Hillbank Spinning Co.*, 1885, 1 Sheriff Court Reporter 129.

8. *For the purposes of this Act, unless the context otherwise requires,—The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour: The expression "employer" includes a body of persons corporate or unincorporate: The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.*

As to the expression "person who has superintendence entrusted to him," see *supra* under section 1 sub-section 2; and as to the expression "workman," see *supra* under the first clause of section 1.

The expression "employer" does not include the Crown, as it is not expressly named. *Att.-Gen. v. Hill*, 2 M. and W. 160, 170.

Secs. 9 and 10, which enact the commencement, title, and duration of the Act, will be found in Appendix A, pages 489-490.

## PART V.

I PROPOSE in this section to discuss numerous subjects which arise in connection with the answer to the following question:—*What alterations should be made on the present law in the light of experience afforded by the working of the Employers' Liability Act?*

It will be remembered by those who are interested in the subject of Employers' Liability that by the tenth and concluding section of the Act of 1880, it was provided that the statute should only "continue in force till the 31st day of December, 1887, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine." This provision was inserted because the Act was regarded to a certain extent as an experiment, and it was thought desirable, I believe, both in the interests of employers and employed that a definite limit of time should bring the subject up again for consideration in the light of the experience to be gained from the operation of the statute. There were those, on the one hand, who regarded the measure as fraught with peril to the prosperity of the country, deeming there was a risk of a paralysis of trade, masters declining to embark or withdrawing capital in consequence of the serious responsibility and liabilities which it was argued would be imposed upon employers of labour by

the statute. On the other hand, from the point of view of certain of the employed, it was argued that the statute did not go far enough in favour of the men. For instance (although the subject after the passing of the Act was put to the test of legal decision), there is no doubt whatever that at the passing of the Act both Houses of Parliament contemplated the reservation of the right to employers and employed to contract themselves out of the provisions of the statute. This reservation was regarded by certain strong advocates of a necessity of an alteration of the law as a serious blot in the Act and a mistake on the part of the Legislature. There was, therefore, a general consensus of opinion that the measure should be a tentative one.

Therefore in little more than a year the Employers' Liability Act of 1880 will, as has been seen, lapse, and there is every reason to believe that one of the labours of this session of Parliament will be to pass an amending Act.

It will be my humble endeavour in this Part to present the points with regard to which controversy will probably arise, in the hope that what may be here set forth may be of some little use in the discussions which will take place in Parliament and in the press throughout the country. With the object above set forth, I think it may possibly serve a useful purpose if I print either in the body of this section, or in the Appendix with reference thereto, certain matter which could no doubt be found elsewhere, but which it may be an advantage to those interested to find incorporated in a convenient way in comparatively few pages.

In the spring of last year two amending Bills were introduced into the House of Commons. The first of these bore on its back the names of Mr. Arthur O'Connor, Dr. Commins, Mr. Sexton, and Mr. Jesse Collings. The second was prepared and brought in by Messrs. Burt, Broadhurst, Joicey, Haldane, and Lockwood. I think it desirable to print the provisions of those statutes here.

#### MR. O'CONNOR'S BILL.

1. This Act shall be construed as one with the Employers' Liability Act (1880), as amended by this Act, and may be cited as the Employers' Liability Act (1880) Amendment Act.

2. *From and after the passing of this Act* all the provisions of the Employers' Liability (1880) (hereinafter called the principal Act), shall have effect and be enforced by every Court, notwithstanding any contract excluding all or any of the provisions of the said Act, or otherwise interfering with the operations thereof.

Provided (a) that this Act shall apply only to cases in which the cause of action arises after the passing of this Act; and provided always (b) that in determining in any case the amount of compensation payable under the said Act, the Court shall take into consideration the value of any payment or contribution made by the employer to or for the person injured in respect of his injury, or in case of the death of the person injured to or for his personal representatives.

3. Wherever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, such contract shall not bar the liability of the employer in respect of injuries sustained by any of the workmen of such contractor by reason of any defect in the condition of the ways, works, machinery, or plant, if such ways, works, machinery, or plant be the property of the employer. In like manner, where such contractor as aforesaid has entered into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, the liability of the employer shall extend to injuries sustained by any workman of the sub-contractor by reason of any defect in the condition of the ways, works, machinery, or plant which is the property of the employer, provided the defect in such ways, works, machinery, or plant arose or had not been discovered or remedied owing to the negligence of the employer, or of some person entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; and provided also that nothing in this Act shall take away any right of action which any workman may have against his immediate employer, or



any right of action which the principal employer may have against his contractor or sub-contractor.

4. The Court in which an action under this Act or the principal Act is to be tried may hold a notice of injury to be a valid notice under section four of the principal Act, notwithstanding that such notice may not satisfy the requirements of section seven of the principal Act; and if it shall appear to the Court that within the time limited by the principal Act for giving such notice, the employer, or his agent, or representative, or any person for whom he is responsible under the principal Act or this Act, had notice or knowledge of the injury sustained by the workman, the Court may direct that the action shall proceed and be maintainable, notwithstanding that such notice as aforesaid had not been given.

5. Notwithstanding the provisions of section three of the principal Act, in case the injured workman shall be under the age of twenty-one years at the time of sustaining the injury, and in the opinion of the judge who tries the action, or if the action is tried by a jury, in the opinion of the jury, the amount of three years' wages, calculated as directed by section three of the principal Act, is an inadequate compensation for the injury in respect of which the action is brought, then, upon an express finding to this effect, compensation may be awarded to the extent of a sum not exceeding *one hundred and fifty pounds*.

6. An action shall not, except by consent, be removed into a superior Court under the sixth section of the principal Act, unless the amount claimed shall exceed the sum of *two hundred pounds*.

7. The term "workman" shall include, besides the persons included in the definition in the eighth section of the principal Act, seamen, and all persons, including omnibus and tramway servants, who have entered into or work under a contract of service made with the employer, either verbal or in writing, and whether the work be performed in the employer's workshops or elsewhere, and whether involving manual labour or not.

8. So much of the eighth section of the principal Act as defines the expression "person who has superintendence entrusted to him" as "a person whose sole or principal duty is that of superintendence" and who is not ordinarily engaged in manual labour" is hereby repealed.

9. So much of the tenth section of the principal Act as declares that the said Act shall continue in force till the thirty-first day of December, one thousand eight hundred and eighty-seven, and to the end of the then next session of Parliament and no longer, shall be and is hereby repealed.

10. It shall be lawful for the Lord Chancellor so far as relates to England, and for the Lord Chancellor of Ireland so far as relates to Ireland, and for two of the Judges of the Court of Session so far as relates to Scotland to make, revoke, or alter rules and orders as

may from time to time be necessary for giving effect to the provisions of or regulating the procedure or fixing the scale of fees payable under this Act.

#### MR. BURT'S BILL.

1. All the provisions of the Employers' Liability Act, 1880 (hereinafter called the principal Act), shall have effect and be enforced by every Court in every case notwithstanding any contract or agreement excluding all or any of the provisions of the said Act or otherwise interfering with the operation thereof:

Provided (1) that this Act shall not affect any contract or agreement made before the passing of this Act; and

(2) That in determining in any case the amount of compensation payable under the said Act by an employer the Court shall take into consideration the value of any payment or contribution made by such employer to or for the injured person in respect of his injury, and also the value of any payment or contribution made by such employer to any insurance fund or compensation fund, to the extent to which any person who would otherwise be entitled to compensation under the said Act has actually received compensation out of such payment or contribution at the expense of such employer.

2. An action shall not, except by consent, be removed into a superior Court under the sixth section of the principal Act unless the amount claimed exceeds *one hundred pounds*.

The Court in which an action is commenced or is pending may at any stage of the proceedings amend any defect in a notice of injury or death, or direct that the action shall proceed and be maintainable, notwithstanding that such notice has not been given duly or at all, if the Court, having regard to the circumstances of the case, thinks just so to direct, and if it appears to the Court that within the time limited by the principal Act for giving such notice the employer, or his agent or representative, had knowledge or notice of the occurrence of the accident, and of the fact that the workman was injured thereby, or that there was reasonable excuse for such defect or omission.

3. This Act may be cited as the Employers' Liability Act Amendment Act, 1886, and shall be construed as one with the principal Act.

These Bills were both read a second time, and were then referred to a Select Committee. After the constitution of that Committee certain alterations were made upon it, and ultimately it was arranged that the Committee should consist of eighteen members, five to be a

quorum. The Members of Committee were:—Lord Charles Beresford, Sir Thomas Brassey, Sir Joseph Pease, Sir Edward Reed, Sir Richard Webster, Colonel Blundell, Captain Verney, and Messrs. Ainslie, Bradlaugh, William Crawford, Crompton, Jackson, Nolan, Arthur O'Connor, Sutherland, Tomlinson, Forwood, and Hingley. Sir Thomas Brassey was chosen as Chairman.

A large amount of evidence was led before the Committee, which has been published in a bulky volume; and the Committee have issued an apparently unanimous report, which in certain particulars may very possibly have partaken of the nature of a compromise.

Still more recently a small but concise blue-book has been issued by the Foreign Office, being "The Reports by Her Majesty's Representatives Abroad on the Laws regulating the Liabilities of Employers in Foreign Countries." These reports were furnished in answer to a circular despatched by Lord Rosebery when Foreign Minister, on 30th March last, to the different noblemen and gentlemen who were Her Majesty's ambassadors in Paris, Berlin, Vienna, Rome, Brussels, The Hague, Berne, Stockholm, and Washington. The object of the circular was to obtain information as to the state of the law as to employers' liability in France, Germany, Austria, Italy, Belgium, the Netherlands, Switzerland, Norway and Sweden, and America.

Lord Rosebery differentiated certain questions on which he more particularly desired information, which are very clearly put, and which are very comprehensive with regard to the whole field of employers' liability. I think therefore it may be well here to print the circular addressed by him.

*Circular addressed to Her Majesty's Representatives at Paris, Berlin, Vienna, Rome, Brussels, Hague, Berne, Stockholm, and Washington.*

My Lord.

Sir,

Foreign Office, *March 30, 1886.*

Questions relating to the liability of employers to compensate workmen injured in their service are likely again to come before Parliament, and I have therefore to request a report on the state of the law on this subject in

I am anxious that the report should give a full account of the provisions of the existing law, and should state whether or not it depends on special legislation ; if so, to what extent, and since what time that legislation has been in force, and should notice any intended or probable alterations.

The following are points of particular importance :—

1. Is the employer limited to any particular classes of employment or classes of workmen ; and, if so, to what classes ?

2. In what cases does the fact that an injury arose from the act of a fellow-workman relieve the employer from liability ?

3. Does it make any difference if the fellow-workman was in authority over the workman injured, or in a position of authority in the employer's business generally ?

4. Is there any difference between the employer's responsibility for the condition of machinery, plant, and permanent appliances of the work, and for specific acts or defaults of workmen ?

5. Is the workman injured required, as a condition of being entitled to compensation from the employer, to give any special notice of the facts, or of his claim ?

6. Are employers and workmen permitted to contract themselves out of the whole or any part of the provisions of the law on the subject ?

7. Generally, is the right to compensation treated as arising out of the contract between the employer and the workman, or as independent of it ?

8. How far does a system of insurance by workmen themselves against accident prevail, compulsorily or otherwise ?

9. In what proportions do employers and employed respectively contribute, voluntarily or otherwise, to insurance funds ?

10. To what extent does the employer reduce his liability by contributing to the insurance funds ?

11. Is the liabilities of shipowners for injuries suffered by sailors in their employment governed by the general law of the liability of employers ?

12. If special legal provisions exist in the case of shipping, what are those provisions ?

13. Is the shipowner's liability limited to (French, etc.) sailors, or does it extend to those of other nationalities in his employment ?

(Signed)

I am, etc.,

ROSEBERY.

There can be no doubt that the result of Lord Rosebery's circular has been a very valuable contribution of material for consideration in the discussion of any amending Employers' Liability Act.

The unanimous report of the Select Committee is couched in a very unusual but, I daresay, a convenient form. It takes the shape of certain abstract resolutions. What I propose to do is to quote here *in extenso* the report of the Committee, which is not very long, and thereafter to take up and discuss *seriatim* the different proposed resolutions which the Committee recommend as supplying "the groundwork for further legislation." Having disposed of these, I next propose to discuss certain other points which the Committee have either intentionally or accidentally not dealt with.

THE SELECT COMMITTEE to whom the EMPLOYERS' LIABILITY ACT (1880) AMENDMENT BILL, and the EMPLOYERS' LIABILITY ACT (1880) AMENDMENT (No. 2) BILL were referred, and who were instructed to inquire into the Operation of the EMPLOYERS' LIABILITY ACT (1880);—HAVE considered the matters to them referred, and have agreed to the following SPECIAL REPORT :—

PURSUANT to the instructions of the House your Committee have taken much evidence as to the operation of the Employers' Liability Act (1880). They have examined employers and workmen engaged in the leading industries, shipowners, seamen, and fishermen, and legal witnesses of experience.

A general concurrence of opinion was expressed as to the advantages which the workmen have derived from the existing Act. The apprehensions as to its possible results in provoking litigation and imposing heavy charges upon employers have proved groundless, while a useful stimulus has been given to the establishment of provident funds and associations, in many cases liberally supported by the employers.

The following resolutions will supply the groundwork for further legislation :—

1. The operation of the Act of 1880 has been attended with no hardship to the employers, whilst it has been of great benefit to



the workmen; and it is desirable that such Act should, with certain amendments, be renewed and made permanent.

2. No contract or agreement made or entered into with a workman shall be a bar, or constitute any defence to an action for the recovery under this Act of compensation for any injury, unless on entering into or making such contract or agreement there was other consideration than that of such workman being taken into or continued in the employment of the defendant.

3. Such other consideration shall be,—

(a.) That the employer shall have contributed to an insurance fund, for the benefit of such workman, against every accident arising in such employment.

(b.) That it has been certified by a competent authority that the employer's contribution to such fund bears a full proportion to the contribution of such workman, and that the benefit to be received by such workman from such fund is fully adequate, having regard, amongst other things, to the amounts recoverable as compensation under the Act. Provided always that if any amounts payable by such society or fund shall not be paid in accordance with the rules, the employer shall be liable to make good any deficiency so arising.

4. Wherever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or wherever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer in respect of injuries sustained by any of the workmen of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if such ways, works, machinery, or plant be the property of, or furnished by the employer, and if such defect arose or had not been discovered or remedied owing to the negligence of the employer, or of some person entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition. Provision should be made to reserve any right of action which any workman may have against his immediate employer, or any right of action which the principal employer may have against his contractor or sub-contractor.

5. So much of section 8 of the Act as defines the expression "person who has superintendence entrusted to him" as "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour," should be repealed.

6. The Court should have power to allow an action for compensation to proceed, though no notice of injury should have been given, or, notwithstanding any insufficiency in the notice actually

given, if the Court should be of opinion that there was reasonable excuse for such want of notice or defective notice.

7. Where a workman is injured, and in the opinion of the judge who tries the action, or if the action is tried by a jury, in the opinion of the jury, the amount of three years' wages, calculated as directed by section 3 of the principal Act, is an inadequate compensation for the injury in respect of which the action is brought, then upon an express finding to this effect, compensation may be awarded by such judge or jury to the extent of a sum not exceeding one hundred and fifty pounds.

8. Provision should be made enabling the judge before whom the case is to be tried, upon good cause shown, to order that the action should be tried before a special jury. In Scotland the parties should have the same rights as to trial by jury as exist in England.

9. The term "workman" shall include, besides the persons included in the definition in the eighth section of the principal Act, seamen, and all persons, including omnibus and tramway servants, who have entered into or work under a contract of service made with the employer, either verbal or in writing, and whether the work be performed in the employer's workshop, or elsewhere, and whether involving manual labour or not. The benefits of the Act should be extended to seamen in cases of accidents arising in home ports. As regards accidents occurring elsewhere than in home ports, the operations of the Act should be limited to those arising from defective equipment.

Your Committee do not consider it necessary under existing circumstances to amend the Bills which have been referred to them, and have, therefore, agreed to report them without amendment.

These resolutions I now take up in their order—(1) *The operation of the Act of 1880 has been attended with no hardship to the employer, whilst it has been of great benefit to the workmen ; and it is desirable that such Act should, with certain amendments, be renewed and made permanent.*

This resolution falls to be read in connection with what may be called the preamble of the Report of Committee, viz., " A general opinion was expressed as to the advantages which the workmen have derived from the existence of the Act. The apprehensions as to its possible results in provoking litigation and impos-

ing heavy charges to employers have proved groundless, while a useful stimulus has been given to the establishment of provident funds and associations in many cases liberally supported by the employers."

That the Act has been on the whole a good and beneficial measure I am not prepared to dispute. I believe, and the evidence led before the Committee strongly confirms this view, that, while the Act has been felt generally as an improvement on the previous state of the law, it has not in the aggregate inflicted upon employers of labour any serious hardship. The main purpose of the Act was that greater care should be exercised with regard to the security of the limbs and lives of the employed; and I fully believe that this good result has been attained. I incline to think that the provisions of the statute have led to greater care being taken by the masters in the selection of those superior workmen for whose shortcomings with reference to due diligence in seeing as to the safety of the men they (the employers) are by the statute responsible; and again, that such superior workmen, themselves with the sense of that responsibility imposed upon them by the provisions of the statute, have taken greater measures of precaution with regard both to machinery under their care and to the directions or orders which they give, and to personal supervision in seeing these carried out with due regard to the safety of those under them.

It is, moreover, a striking fact that in the voluminous evidence led before the Committee no case of ruinous or even serious loss to an employer has been cited. No doubt, as will afterwards be seen, to a very great extent those employers of labour who have not

contracted themselves out of liability to the workmen have secured themselves against loss by insuring their risk of accident under some one or other of the different Employers' Liability Accident Companies which have been established since the passing of the Act. Whatever view may be taken of the operation of the statute, the evidence led before the Committee incontestably proves that the statute has been the cause of the institution of a large number of provident societies, a result which, while of course a matter primarily for the benefit of workmen, has also a beneficial effect with regard to the employers of labour, because the development of thrift among the working classes has a tendency to improve the value of the labour afforded by the workmen.

While, however, agreeing in the general result of the advisability in the interests of both employer and employed that the Act of 1880 should with certain amendments be made permanent, I am not at one with the Committee in saying that the apprehensions "as to its (the Act's) possible results in provoking litigation and imposing heavy charges upon employers have proved groundless." We in the Sheriff-Court of Lanarkshire know very well that a large increase of litigation has taken place in consequence of the passing of the Employers' Liability Act, not only litigation where a plausible case of liability is presented for the determination of the Court, but that there are many cases brought into Court founding on the statute in which, had really any substantial inquiry been made previous to the raising of the action, the action would have been known to be a hopeless one. Nay, more, it is known to the profession that cases have been brought

solely with the object of extracting money, not for the alleged injured workman, but for the litigating agent. In such cases, the employer is in the first place put to the trouble and worry of a groundless action, and in the second place, as the pursuer has absolutely no means, the employer, although successful and found entitled to expenses, is unable to recover these.

It appears from his evidence that Mr. Lees, one of the Sheriff-Substitutes at Glasgow, made some analysis of cases depending in the Ordinary Sheriff-Court of Lanarkshire, at Glasgow, between 16th May, 1884, and 23rd April, 1885, and brought under the provisions of the Employers' Liability Act, and I may take his evidence with regard to the proportional amount of success of pursuers and defenders. Ninety-nine cases, it appears, were in dependence during this period, and seventy-six were disposed of. Of these seventy-six, fifty were fought out to judgment, and of the fifty, the pursuer was successful in fourteen and the defender in thirty-six of the cases. Mr. Lees assumes that in twenty out of the other twenty-six a payment of some kind or other was made to settle the case. There can be no question that as the law stands in many cases a defender is glad to settle that which he knows to be an unfounded claim in law for this very simple reason, that the expenses of a litigation to him, if successful, will be much greater than the payment of £20, £30, £40, or £50 which he pays to get rid of it, and there is good reason to believe that to some extent the knowledge of this fact is worked by unprincipled agents.

Can it be doubted that if the proportion of cases in which the pursuer is successful is only as that of



fourteen to fifty, substantial inquiry previous to the raising of the thirty-six actions in which defender was successful would have shown that in a considerable proportion of these there was no chance of success. I do not take the cases settled out of Court into account in this calculation, because, as has been pointed out, that is no index to the question of whether the claim settled is a just or an unjust one.

One of the witnesses examined was Mr. MacIntyre, the manager of the Northern Accident Insurance Company (Limited), the principal business of which is insuring employers against the risks under the Employers' Liability Act, and he makes a suggestion in connection with this matter which I for one, as having a considerable experience in actions brought under this Act, am inclined to regard as very well deserving consideration. One of the threats which I understand is sometimes made use of with a view to extorting a settlement of an action by payment of a sum of money, is to threaten to carry the case to the Court of Session for jury trial, the expense of which to a defender even if successful will probably not be less than £100. It may be said, but how is the poor man or woman, as the case may be, to get the case taken for jury trial? If the employer is put to this expense, how can the employed bear such an expense? The answer simply is that no such expense is risked. It is well known that in Edinburgh there are speculative agents, and speculative counsel too, who wholly contrary to the etiquette of the profession, arrange to rely upon fees being paid only in the event of success. The suggestion then made by Mr. MacIntyre is to be found in the following queries and answers :—

“3354. Do these points, which you have mentioned, embrace the principal matters which you wish to bring under the notice of the Committee?—There is one other important matter which I consider fully as important as any of the other points.

“3355. Will you make a short statement on that point; what is it?—It is the question of the expense of litigation. Our experience has been that since the passing of this Act, or at least my experience has been within the last four years, that a class of solicitors has sprung up who give themselves largely or exclusively to instigating proceedings under the Act.

“3356. What do you wish to propose, to put a check upon the action of these persons; what remedy do you suggest?—It is difficult to suggest a suitable remedy for such a state of things, because the principle of all legislation is that the Courts of Law are to be open to whoever wishes to resort to them. As, however, the legislation on this subject is remedial legislation, intended to alter the common law, it is not unfair that persons availing themselves of the benefits thereby conferred should comply with special provisions applicable to such cases. It has been suggested to me in various quarters, and by many persons, that the proper remedy is, where, in the opinion of the Judge, the action is frivolous or so clearly destitute of foundation, that it should not have been brought into Court, that he should hold the plaintiff's solicitors liable in the defender's costs.”

I would, however, be inclined to formulate the suggestion in a somewhat more definite way, and only give the power to the Judge on motion made by counsel or agent for the defenders, and it would be necessary that a distinct finding to the effect indicated should appear in the judgment. I would suggest that whenever on motion made, the Judge found that the action was a frivolous one, and that any substantial inquiry made in relation to the accident, prior to the raising of the action, would have disclosed that no valid ground of action lay against the defender, it should then be in the power of the Judge to subject the solicitors for the plaintiff or pursuer to the penalty of costs. It is

not a power which I imagine would be very frequently exercised, but it seems to me that it is a power, which, in the interests of the public to prevent dishonest litigation, should be in the hands of the Judge.

With reference, however, to the above proposal, I would not make it applicable to cases raised in Scotland on what is called the *poors' roll*. The *poors' roll*, I may explain, is a roll to which persons are admitted without having to pay any costs for litigation to the clerk of Court, after a certain inquiry has been made (1) as to their destitution, and (2) as to their having a probable ground of action. A petition, with a certificate of poverty granted by the minister or two elders of the parish in which the petitioner lives, is presented to the Sheriff, setting forth that such petitioner has grounds for an action against some one or other. That petition is remitted to two agents of the Court, who require to give an opportunity of being heard to the proposed defender in the action. After this diet the agents report to the Sheriff whether there is or is not a good ground of action, and upon their report the petitioner is either admitted to the benefit of the *poors' roll*, or the application is dismissed. It would be manifestly unfair to subject the agent who had raised the action, after such inquiry, in personal expenses, but besides there is the guarantee by the previous inquiry as to there being some good ground for trying the action.

Later on, I will have occasion to deal with the question of jury trial. As the law at present stands, the only machinery for jury trial is to take the case to the Court of Session. Sheriff Lees and Mr. Shaughnessy have proposed that in Scotland there should be

a power to have jury trials in the Sheriff-Court in connection with cases raised under the Employers' Liability Act, or where the action is raised alternatively at common law and under the Act. I am wholly opposed to jury trials in this class of cases. There are so many difficult questions of law mixed up with facts attending accidents generally that in my opinion a far more satisfactory tribunal for the determination of these cases is a tribunal where a professional Judge sits dealing both with the law and the facts; and in connection with the costs of litigation, I will merely say here, though I will have occasion to advert to these farther on, that I would be inclined to do away wholly with the right of appeal for jury trial in all actions laid on the Employers' Liability Act, so far, at all events, as Scotland is concerned. In Scotland, it has been the daily habit of Sheriffs to sit as juries in assessing damages; and while it is a matter of common occurrence for the Court of Session to set aside verdicts of juries on the ground of excessive damages, it will be found that very rarely does the Court of Session interfere one way or other with damages assessed in the Sheriff-Court, unless the Court has held that as matter of law the defender was not liable in damages at all.

Another point as to litigation, in the way of its being vexatious, is where a judgment has been obtained in favour of the same party from both Sheriff-Substitute and Sheriff, and yet the case has been appealed without any security for expenses to the Court of Session. I should be inclined to refuse to allow cases under the Employers' Liability Act to be appealed either by the pursuer or defender, where the judgments of both

Sheriffs are against one or other, without security being found for the costs of at least the appeal, if not of the whole costs of the case. To this extent, at all events, I think the law should be altered; but later on I will deal with proposals of a more extensive character affecting legal procedure.

I now pass on to the second resolution, which is one of the most important resolutions, if not the most important, in the whole report. (2) *No contract or agreement made or entered into with the workman shall be a bar, or constitute any defence to an action for the recovery under this Act of compensation for any injury, unless on entering into or making such contract or agreement there was other consideration than that of such workman being taken into or continued in the employment of the defendant.*

It is expedient that this resolution should be taken up and dealt with along with the third resolution, which is as follows:—(3) *Such other consideration shall be—(a) That the employer shall have contributed to an insurance fund, for the benefit of such workman, against every accident arising in such employment; (b) That it has been certified by a competent authority that the employer's contribution to such fund bears a full proportion to the contribution to such workman, and that the benefit to be received by such workman from such fund is fully adequate, having regard, amongst other things, to the amounts recoverable as compensation under the Act. Provided always that if any amounts payable by such society or fund shall not be paid in accordance with the rules, the employer shall be liable to make good any deficiency so arising.*



The great question of whether employers and employed should be permitted to contract themselves out of the Act was one which was prominently before the Select Committee on Employers' Liability which sat in the years 1876 and 1877. No reference to the question appears in the report which was presented to the House of Commons in 1877, but it is the fact that the Committee had the matter before them in a proposed paragraph which Mr. Shaw Lefevre suggested should be added to the report, and which was expressly negatived by ten votes to two, the only other member of the Committee who supported Mr. Shaw Lefevre being Mr. Macdonald. The proposed paragraph was as follows:—"Your Committee are further of opinion that in any change of the law thus recommended employers should not be permitted to contract themselves out of the liability to be imposed upon them. They cannot now contract themselves out of liability for their own personal negligence. Railway companies are not permitted to contract themselves out of liability to their passengers for the negligent acts of their servants. Shipowners are not permitted to contract themselves out of liability to their seamen for the seaworthiness (*sic*) of their ships. The same principle should be maintained in any extension of the liability of employers for the negligent acts of their managers."

In the draft report, moreover, prepared by the Chairman, Mr. Lowe (which draft report was rejected by the Committee in favour of that prepared by Sir Henry Jackson), the paragraph quoted at page 142 appears, and having regard to the large majority which negatived Mr. Shaw Lefevre's proposal, there seems no

reason to doubt that this paragraph represented the views of the majority of the Committee on this subject, although it was thought unnecessary to insert a reference to it, as it was well understood that, unless it was made expressly illegal to contract out of the Act, the power to do so would be in the hands of the employers and employed.

The evidence, however, led before the more recent Committee goes to show that a very considerable change of opinion has taken place with reference to the point under discussion. Whereas the result of the previous Committee's deliberations and the terms of the Employers' Liability Act of 1880, which was the outcome of the Committee's labours, left it absolutely free to masters to refuse employment unless the men agreed to take it upon the footing that they were to have no claim for compensation in the event of accidents happening which otherwise might furnish a claim under the Employers' Liability Act, it is not too much to say that there is no dissentient voice either in the witnesses examined or in the members of Committee themselves from the principle that masters shall not be allowed to contract themselves out of the Act with the men unless there be some fair equivalent given to the men for their assenting to such contract.

This in some part, and perhaps mainly, is due to two considerations—First, that experience has shown that the apprehensions on the part of the masters as to the serious pecuniary liabilities that would follow from the passing of the Statute of 1880 have been proved to be groundless; and, second, that the establishment of numerous liability insurance companies throughout the kingdom, one of the results of the Act,

has enabled masters, without the payment of any excessive premiums, to protect themselves wholly from any liability.

As regards the first of these two points, the evidence of Mr. Hood, the owner of several collieries in Scotland, and the Managing Director of a large company in South Wales, may be given as showing the light in which the Act is now regarded by colliery owners, and, indeed, may be accepted as the view of masters generally.

“5529. Have you considered the operation of the Employers’ Liability Act?—I have.

“5530. Did you concur generally in the opinions entertained beforehand as to the operation of that Act?—I did not. The opinion entertained by many colliery owners was that it would be very prejudicial to their interests. I never held that opinion, and my experience has borne out what my opinion then was.

“5531. Have you had many claims for compensation as the result of it?—I have never had a single claim in South Wales for compensation.

“5532. Has there been any attempt in reference to your collieries to enter into any arrangement out of the Act?—I have given them all the opportunity of contracting out of the Act, but they have never availed themselves of it.

“5533. Then none of your colliers are contracted out of the Act?—None of them.

“5534. And none of them have ever made a claim?—None of them have ever made a claim.”

With reference to the second of these points, it may be noted that the premiums of all liability insurance companies as regards risks under the Employers’ Liability Act have fallen very considerably. This, to some extent, is no doubt due to competition, but also necessarily it shows, assuming financial soundness, that the risks are not so great as were at first imagined.

In the Blue-Book containing the report and minutes of evidence of the recent Select Committee there is unfortunately no analysis of evidence such as that which was given in the Blue-Book containing the labours of the previous Committee. In these circumstances it has occurred to me that it may be useful in connection with subsequent discussion on this important point to give copious references to the evidence led in connection with the question of whether employers and employed should be allowed to contract out of the Act, which will be found in Appendix B. I leave out in the meantime entirely the question as to seamen, which will fall to be dealt with later on in connection with the 9th resolution of the Committee.

It may be that different views may be taken of this question in connection with the different descriptions of industry. I propose to take them up in different sections—(1) Collieries, mines, and iron industries; (2) Building and other trades; and (3) Railway servants.

(1) As regards collieries and mines, the evidence referred to in the Appendix will show that there are at least three different views—First, that the masters shall not be allowed to contract out of the Act, whether the men are willing to do so or not. Second, that the masters and men shall be permitted to contract themselves out of the Act on the masters contributing a certain proportion of the insurance premiums required to an insurance benefit society, to compensate the workmen or their representatives to a certain extent for all accidents occasioning injury or death, whether such accidents are, or are not, due to causes for which liability is established under the Act. Third, that while workmen shall be at liberty to contract them-

selves out of the Act, in the manner specified in No. 2, it shall not be compulsory for workmen to contract themselves out of the Act, even though the majority of their fellow-workmen elect to take this course; but if a relief society be established by a large proportional majority of the men in the district, such workmen as do not elect to go in for the proposed scheme shall be dismissed by the master, unless they not only contribute to the insurance fund the proportion which the other workmen pay, but also the masters' proportional contribution.

There is still, however, a fourth suggestion, that no workman, whatever may be the opinion of his fellow-workmen in the district, shall have any compulsion applied to him at all, directly or indirectly, with regard to joining an insurance fund, and accordingly that a workman taking this view, although he may be in a very small minority of the men in the district, shall be permitted to decide for himself neither to contribute to any insurance fund against accident, nor to contract himself out of the Act. I think it will appear from what I say below that such a course is inadmissible.

At the outset, we are confronted with the difficulty that the division into districts throughout the United Kingdom of colliers and miners is entirely an arbitrary one, due to voluntary associations on the part of the miners themselves, and the question is at once suggested, "If the provisions of legislation are in any sense to be dependent on the plurality of votes in a district, must legislation not also provide for some division into districts of miners and colliers throughout the country?"



Assuming that it is right that this should be done, I confess that I see no insuperable difficulty to methods by which it might be done. It is probably outwith my province to lay down lines for such procedure, but I would suggest that, having special regard to county limits and the number of men employed therein, and benefit societies already established, delegates from the miners themselves throughout the country should, as commissioners, be employed to fix mining districts not exceeding 50,000, and not less than 40,000, which should be the area and limit of prospective insurance relief funds throughout the kingdom. I can imagine difficulties when there are already districts of larger numbers than those indicated, where benefit societies are already in existence; but I submit that there really are no insuperable difficulties in dividing the whole kingdom into such districts, and if the advisability of this were determined on, Parliament would find a means of carrying it out.

Premising, then, that this has been done, I venture to make a further assumption, which, however, is one which the report of the Committee itself endorses, viz., that it is in the interests of thrift and of the workmen themselves that such benefit societies should be established throughout the kingdom. What I then propose is that, if four-fifths of the men working in the district (or three-fourths or two-thirds, or whatever proportion Parliament may sanction *quoad hoc*) are of opinion that it is desirable that a relief fund should be established for compensation or relief in all cases of accident, then it shall be binding upon the men of the whole district to establish such a relief society to which all shall contribute, the masters contributing one-fourth

of the premiums contributed by their respective employés, who for such consideration will then discharge their masters' obligations under the Act, and such men as decline to contract themselves out of the Act contributing the proportional quarter which would otherwise be contributed by the masters; declinature to contribute to this fund at all being recognized as moral justification for the masters declining to employ men refusing.

If, on the other hand in the district the proportional majority referred to of the men in favour of the institution of a benefit society should not be obtained, then there should be no contracting out of the Act, the masters of course not being expected to contribute in any way to such voluntary benefit societies as the men might think fit to establish in the district.

It will be observed that the main contention of those witnesses who protest against any contracting out of the Act is based upon the following theory:—The promoters of the Act looked primarily, not to possible compensation in individual cases, but to greater security being afforded against injury to life or limb. If masters contract themselves out of liability, the security otherwise afforded to the workmen through the masters taking precautions to avoid liability is lost. This is not sound, having regard to the matter from a practical point of view, because, in the great majority of cases, the master, if the workman does not agree to contract himself out of liability, protects himself against liability by insuring himself with a liability accident company. A good deal of evidence was led as to this matter before the Committee, and I admit that it is open to argument whether the master should

be permitted to secure complete immunity in this way. Mr. Chamberlain, it will be remembered, in connection with merchant shipping, had a proposal that ship-owners should be allowed to insure their ships to a proportional extent only of their value. Later on, I intend to deal with the question of whether employers of labour should be permitted to insure their possible liability under the Employers' Liability Act to its full extent. It is a difficult and delicate question whether legislation can interfere in a matter of this kind, but judging from experience, and having regard to the working of the Employers' Liability Act of 1880, when the master had this loop-hole of insuring his liability, it is idle to pretend that any security would have been afforded by its being made illegal to the master to contract out of the Act with his own workmen. Such masters as are willing, and are in the position to contribute a quarter of the men's premiums, would almost invariably, if their men decided not to contract out, guard themselves by insurance. As matter of fact, the evidence conclusively shows that those masters who contracted out of the Act with their workmen, while at the same time paying a proportional contribution to benefit societies, must have lost, if regarded in the aggregate, very considerable sums. Take one example. The evidence given by Mr. Hood shows that not one action was raised under the Employers' Liability Act in connection with the collieries in England with which he had to do. He made an offer to the men to pay an annual contribution to a benefit society if they agreed to contract themselves out of the Act, which they refused, and to this fund he accordingly declined to contribute. He actually saved thereby the whole

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annual premiums which, in terms of his offer, he as master would have paid into the benefit fund.

It will be noted by those who refer to the Appendix, and the portions of evidence in the last Committee's Blue-Book specified in said Appendix, that there is a great conflict of evidence between the miners and their representatives as to whether contracting out of the Act should or should not be allowed. Perhaps of all the evidence given that of Mr. Pickard, the best known, I think, of all the miners' agents in the country, struck me as most interesting and important. He looks at the matter solely in the miners' interests, but in a broad and liberal spirit. I confess that it seems to me difficult to resist the conclusions at which he arrives. It appears from his evidence, and that of Mr. Hewlett, that Mr. Pickard was mainly instrumental in arranging that the great majority of the men in the Lancashire district should contract themselves out of the Act on the footing that the masters subscribed in a certain considerable proportion to a benefit society for the men. It is perfectly clear, and no one of the witnesses examined ventured to suggest a doubt on the subject, that in doing what he did he was actuated solely by the consideration of what he deemed to be for the best interests of the men.

The arrangement made was a contribution to a fund by the masters, which gave benefits to the men or their representatives on account of accidents occurring in the pits in which they were employed, whatever the cause.

In the vast majority of accidents in pits, there is no liability under the Employers' Liability Act. Many of the accidents which occur there are due to un-

avoidable accident, *e.g.*, falls from the roof, for which, in the general case, it is impossible to attach blame to any one. Many accidents, again, are due to the faults of the injured workmen themselves; while, again, another large proportion of such accidents is due to the faults of fellow-workmen. Thus it is only for a very small percentage of cases where accidents occur in pits that masters can be made responsible under the Employers' Liability Act.

Previous, however, to the passing of the Act certain of the masters had encouraged, by contributions of their own, the development of benefit societies among the workmen for all cases of accidents. The Act gave an impetus to these societies, the masters increasing their contributions on condition of the men contracting themselves out of the Act; but Mr. Pickard saw that the benefit societies with which he had more immediately to do would be crippled, if not brought to a stand-still, by the masters refusing to give further contributions if there were no contracting out of the Act. He saw, for the reasons already explained, that it was of infinitely more importance to the whole body of his miners to have the masters largely supporting the benefit societies rather than that their contributions should be discontinued, and the men be able on rare and exceptional occasions to succeed in actions under the Employers' Liability Act, hence, as detailed in the Appendix, he succeeded in carrying through the arrangement, which has already been referred to, in Lancashire, and as to the advisability of which, as appears more especially from Mr. Campbell's evidence, there is great controversy among the workmen themselves. I understand from Mr. Pickard's evidence



that he is of opinion that this matter should be left entirely to mutual arrangements as between master and man.

In connection with collieries and mines I have negatived the suggestion that it is advisable absolutely to prevent the men having the option of contracting out of the Act. The second theory was that masters and men might contract out of the Act on a mutual arrangement being made, whereby, in consideration of discharge by the workmen of their right of action at common law and under the Act, the masters should pay a certain proportional part of the whole annual premiums necessary for the up-keep of an accident or other benefit society, through which, *inter alia*, for all accidents arising, whether from causes for which the master was liable or not, the men might secure a fair amount of aliment during inability to work, or in case of death a certain payment to their families. There is no doubt on the evidence that for far the larger proportion of accidents which happen neither at common law nor under the Employers' Liability Act are coal-owners responsible. In these circumstances in the usual case, that is to say in the aggregate, the masters lose money by contributing not less than a fourth of the whole fund rather than accepting the risk incident to their relation of master and servant under the Employers' Liability Act.

But now comes in a practical question in connection with the amount of funds requisite for the financial soundness of a benefit fund. If the fund be formed upon the basis of the contributions of 50,000 men, they contributing three-quarters of the whole fund and the masters the remaining quarter, it is very obvious that if a

certain proportion of these men refuse to contribute to the fund its financial position would not be on a sound basis. That is very clear ; but further, supposing, let us say, 10,000 of these men declined to contract out of the Act, but were perfectly willing, each man let us say, to pay 3d. per week, the same contribution as their fellow-labourers but no more, what then? The masters, let us suppose, are perfectly willing to allow men to remain in their employment who refuse to contract out of the Act, but they say, "We, of course, are not going to contribute the fourth of the premiums applicable to the payments of those men who decline to contract out of the Act." In point of fact they would say to the managers of the insurance fund, "You must strike off all the contributions of men who have declined to contract out of the Act. We will only pay a fourth of the balance remaining after that deduction." Now, therefore, the trustees of the fund must intervene in justice to the majority, who, for what they consider greater advantages, have contracted out of the Act. Accordingly the majority of the men would say to the dissenting minority, "Each of us pays 3d. per week, plus 1d. per week paid by the masters for us, but each of you only contributes 3d. per week ; if, therefore, you do not arrange with the masters that they shall pay the extra 1d. per week for you, you must pay it yourselves." This seems only fair and just. If a benefit society be established and the soundness of its financial position be based, and I think it almost necessarily must be, on an estimate of the contributions of the whole men employed, then it follows that each man must make that proportional payment which is his proper contribution, whether he arranges with the master to pay a por-

tion thereof or not. Of course a master may decline to give employment to any one whom he chooses, but this power is so far controlled that if a master refuses to give a workman employment for some public reason which the workmen consider unjust or improper, it is in their power to combine and refuse to accept employment under the master proffering such objectionable conditions. Where, however, the condition is one which commends itself, not only to the master but to a large majority of the men, as a reasonable one, then I submit that there can be no impugning of the master's resolution with reference to such condition of employment as arbitrary and unjust.

The conclusion, therefore, at which I have arrived, upon a perusal of the evidence laid before the Committees, and as the result of other considerations, I may sum up as follows with reference to collieries and mines:—1. Contracting out of the Act shall be permissible to masters if they arrange with their men on the footing that the former contribute to a benefit fund not less than one quarter of the whole contributions of masters and men conjointly, such benefit fund to provide for reasonable compensation in all cases of accident occurring in employment from whatever cause arising. 2. That, however, to recognize such contract it shall be necessary to establish, to the satisfaction of the Home Secretary or some official to be named in the Act by actuarial or other evidence, that such benefit society is established on a sound financial basis.

As regards iron industries, as apart from mines, such as great engineering establishments, these, perhaps to a certain extent, are upon a different footing. In

many works of the kind throughout the country it would be difficult to have the numbers essential to the stability of a great benefit society, without such a deduction from wages as would infer a serious hardship to the men employed. If, indeed, there could be one vast benefit society, amalgamating the existing benefit societies connected with coal and iron industries in one homogeneous whole, then indeed I would regard this as the best solution of the difficulty; but if this be impracticable, then perhaps no distinction can well be drawn between engineering and other large establishments connected with iron industry, and those other trades to which I propose immediately to refer under building and other trades, and to this branch of my subject I now come.

I may just add here that in Scotland there has substantially been no contracting whatever out of the Act; as regards Ireland I am not in a position to speak, and there seems to have been practically no evidence led before the Committee referred to with regard to the operation of the Act in Ireland.

(2) Building and other trades. The evidence as to the building trade, which, indeed, apart from railway employés and coal and iron industries (sailors excepted) is very much the only trade as to which there is evidence as to this matter, stands, I think, in a very different position from that led as to coal and iron industries and railways.

One of the principal witnesses examined on behalf of the building trade was Mr. George Shipton, who is secretary of the Amalgamated Society of House Decorators, of the London Trades' Council, and of the National Trades' Union Congress. Extracts from his

evidence will be found in the Appendix, but the result of his evidence, speaking as for the men, and the evidence of Mr. Stanley G. Bird, who is president of the Institute of Builders, chairman of the Builders' Accident Insurance Coy., Limited, past president of the National Association of Master Builders of Great Britain, and vice-president of the Central Association of Master Builders, as representative of the masters, pretty clearly demonstrate I think two things. The first of these is that after the passing of the Employers' Liability Act there was an attempt on the part of the masters in connection with the building industries in England to coerce the men in their employment to contract out of the Act without any equivalent therefor. The second, that the men's resistance completely foiled this attempt, and that the masters thereupon proceeded to a considerable extent to cover their liability by insuring it.

Now, so far as I can understand from the evidence led, except in the case of railway companies, coal and iron industries, and one alkali work, no attempt on the part of either masters or men to establish benefit societies since the passing of the Employers' Liability Act has been made. The question arises in these circumstances whether, in connection with all trades except those named, contracting out of the statute should not *hoc statu* be made null and void. It may be said that it is a mutual advantage to permit contracting out of the Act on a joint arrangement between masters and men to contribute mutually to a benefit fund. In some senses I think it is. But since experience has shown that there has been no disposition on the part of either masters or men to establish such societies, is



it desirable for Parliament to legislate on remote possibilities? I incline to answer in the negative, and I think it would tend to prevent complications in the amending Employers' Liability Act if the power to contract out of the Act were reserved to those trades and employments which the experience of the last six years has showed have gone practically about the establishment of benefit societies, that is to say, to the coal, iron, and mining industries and the railway systems.

(3) The Railway system. A large amount of evidence was led with reference to the system of contracting out of the Act pursued by the London and North-Western Company towards their employés. Extracts from the evidence with regard not only to this Company, but also with reference to the London, Brighton, and South Coast Railway Company, will be found in Appendix (B).

Mr. George Findlay, the general manager of the London and North-Western Railway Company, was examined. From his evidence it appears that there are in the service of that Company upwards of 53,000 men. Previous to the passing of the Employers' Liability Act Mr. Findlay states:—"We had partially dealt with the question in establishing an insurance fund and a provident fund; I think I was mainly instrumental in doing that about the year 1871, some eight or nine years previous to legislation that took place in the beginning of the last Parliament." At first he states it was entirely voluntary on the part of the Company, and it was optional to the men either to join it or not. He explained that out of the 53,000 there were 36,364 in the general insurance society, and 14,839 in separate insurance societies connected with

the locomotive department, making a total of 51,203 insured, the explanation, as I understand, of the difference between those two figures, viz., 53,000 and 51,203, being that it was only optional to the employés in service at the date of the institution of the general insurance for the men to join or not. Some of the men who were at that date in and have since stayed on in the service have never joined the insurance fund, and this has not been insisted on. But the railway company in question now make it compulsory on all new men. The object of the society is thus explained by Mr. Findlay :—"The object of the society is to meet cases of death arising from accident whilst in discharge of duty, or of temporary or permanent disablement by the loss of limbs or any other casualty of that character, by weekly allowance for temporary disablement ; and there was a small sum of £10 paid when death arose from natural causes, £10 to those in the first and second class, and £5 to those we call boy-porters in the establishment. There were three classes, the premium being 3d., 2d., and 1d. per week, and corresponding higher or lower benefits." To this fund at the time of the passing of the Act the Company contributed £1,500 per annum, but after the Act passed Mr. Findlay, feeling very strongly the importance, not only of keeping the men with the Company, but with the object of possibly preventing litigation between any of their employés and themselves, agreed to increase the Company's contribution, keeping the contributions of the men at the same rate ; the result has been that for the five years following the Act, instead of contributing £7,500, the Company have contributed no less than £77,843, nearly ten times what they otherwise

would have contributed, and forty-five per cent. of the whole contributions of the men. Roughly speaking, the contribution of £1,500 per annum by the railway has been raised to £15,000 per annum. It is a condition of the service that all men shall join this society and discharge any right of action which, apart from such contract, might emerge by accident were there no such contract. Mr. Findlay states that there has been no difficulty whatever in recruiting the service under those conditions. I think it unnecessary to go into other particulars as to the smaller locomotive insurance society also in connection with the same railway company. The principle is sufficiently explained for my purpose. The following quotation from Mr. Findlay's evidence is of importance, it being conceded, as I think it must necessarily be, that it is an enormous advantage to the men to have such an insurance fund:—"I should like to say that if the Act was amended so as to prevent the men from making contracts of this kind I believe it will be impossible to continue the society in its present form; that by no desire on the part of the Company to terminate it, it would of itself naturally come to an end, because, although we have a large number of men—between 50,000 and 60,000 are in the service—the recruiting of the men goes on constantly, and I am bound to say that in some departments it changes very quickly. We recruit to an extent of 8,000 or 10,000 men every year, so that the society, which has now 50,000 men, would by the influx of 10,000 per year in the course of a few years practically die out of itself. Therefore I say that if the Act is amended in the direction which I understand these Bills point to, it

would of itself, I think, kill a society of this kind." Mr. Findlay further gives reasons for holding that if the power of contracting out of the Act was absolutely barred it would be impossible to expect that the Company would continue to contribute to such an insurance fund.

The evidence of certain of the employés in the London and North-Western Railway Company is to the effect that the men were almost unanimous in favour of the existing arrangements being continued. Thus, Mr. Currier, a foreman in the goods department of the Company, said:—"On the proposed Amendment Bills becoming known to our members, spontaneous meetings were called by themselves, and the matter was discussed and motions were passed that the delegates should do all in their power to endeavour to petition Parliament to ask them to insert some clause in any Act that became law to preserve to them the rights which they now enjoy under the arrangement made with the Company."

Mr. Samuel Laing, the Chairman of the London and Brighton South Coast Railway Company, was also examined before the Committee. He stated that before the Act was passed there were in operation five different provident funds, and these had been in existence from twenty to thirty years before 1880; an insurance fund against accident, to which the Company contributed half and the men half; there was a benevolent fund, to which the Company put aside £1,000 a year to meet very special cases; there was a superannuation scheme providing for retirements of men worn out of service after a certain age, to which the Company contributed half; there was

the savings bank of the Company, who gave  $3\frac{1}{2}$  per cent. up to £50, and 4 per cent. above £50; and a provident society managed entirely by the men themselves, to which the Company's directors and a good many of the shareholders themselves subscribed.

When the Employers' Liability Act was passed the directors of the Company re-considered their position, with the result that a circular was issued to the railway employes. Mr. Laing gave the following excerpts from that circular:—"The passing of the Employers' Liability Act, which takes effect on 1st January next, makes it necessary to decide what is to be done with some of the above funds. The Provident Society Superannuation Fund and Savings' Bank will, of course, not be affected by it, but it is obvious that if the men generally prefer to rely on the legal claim for compensation for accidents given by the Act, the Company could not continue to pay for a second insurance in the shape of a large voluntary contribution to such funds as the insurance and benevolent. As a mere money question it is immaterial to the Company which course the men elect to adopt, as it is almost certain that the average amount which it would have to pay for compensation under the Act would be less than that which it has been voluntarily paying; and the directors wish it to be understood that they have no desire to exercise the least compulsion in this matter. On the contrary, they wish each man individually to decide for himself whether the advantages which it is now proposed to offer are or are not more than an equivalent for those given by the Act, and no man would be in any way prejudiced if he should elect to go under the Act." Then the Company



made a proposal as to a scheme greatly increasing the benefits to the men under the insurance scheme. "Practically," said Mr. Laing, "we propose to double the amount of insurance in case of death, and extend the period for temporary disability, the men paying the same premium, so that practically the Company had agreed to pay three-fourths instead of one-half of the premiums." At Mr. Laing's suggestion the men elected a large committee, representing all the different branches of employment. Mr. Laing met that committee on various different occasions in conference. A good many suggestions were made and adopted in the scheme, and Mr. Laing pays a tribute to the reasonableness and intelligence of the men. "I should like to say here that I never met a more intelligent body in my life. If anybody fancies that working men of that class are not capable of looking after their own interest they are very much mistaken." It was in consequence of their suggestions that certain modifications were made in the scheme. This railway system is of course nothing like the extent of that of the London and North-Western. The scheme was substantially adopted by the whole of the men, because out of some 9,000 employés only 195 originally declined. The scheme has been in operation for five years, 9,025 are insured under it, and only two ultimately declined to assent to the scheme. "No difference," added Mr. Laing, "has been made in respect of those men." In the five years subsequent to the Act there has been paid in compensation £33,455, an average of £6,691 per annum, of which the men paid in the aggregate £10,350 to the Company's £23,105, the annual payments of the men being £2,070. There can be on

question, as pointed out by Mr. Laing, that financially the Company have been losers by contributing to such an extent to the fund, rather than accepting the risks imposed on them by the Employers' Liability Act, but, as Mr. Laing explained, "our great object in the matter was, mainly, to avoid the ill-feeling and difficulties that must occur if we were constantly in litigation with our men in cases of that sort."

The distinction in the case of the London and North-Western and the London and Brighton and South Coast Company is, that whereas in the former it is compulsory as a condition of employment that their employés should join the insurance fund and discharge any right of action under the Act, in the latter case it is voluntary, but, as pointed out by Mr. Laing, the scheme proposed by the Company has been practically universally accepted by the men.

It is, however, right to say that there are certain dissentient voices on the part of the men. Thus, Mr Edward Harford, the General Secretary of the Amalgamated Society of Railway Servants, which society represents in round numbers some 10,000 men, said in the course of his evidence:—"The views of the greater majority of my society are decidedly against contracting out of the Act; we look at the various insurance schemes which have been established by the railway companies as a species of charity which we consider as rather debasing to accept; we think they should be left free to exercise their own discretion in the matter, and that if any paternal care was required of them, it had better be exercised by the State than by their employers, for the reason that we consider it places an undue amount of power in the hands of

the employer." Mr. Harford then stated that there had been expressions of opinion to him on the part of all servants of the London and North-Western Railway with whom he had come across, that contracting out of the Act should not be permitted.

The chief objection, as I understand, is that which was indicated in Mr. Harford's evidence quoted above, viz., that it gives the employers too much power over the men. In other words, it is an objection from the Trades' Union point of view, and is not founded upon the consideration of what are the comparative advantages and disadvantages of contracting out of the Act on payment by the companies of large pecuniary contributions, in consideration of the men discharging their rights under the Act. On the evidence it hardly seems to me to admit of argument that from a pecuniary point of view, and from the politico-economical point of view, in the interest of thrift, the employers' scheme is a far greater advantage to the men than the possibility of valid grounds of action arising under the Act and preserved to the men.

Nor does it seem to me that any valid argument can be found in the theory that if the liabilities under the Act are retained to the men, there is really any greater security for life or limb. The nature of employment upon railways is of an exceptional kind. This is well known to the men themselves, and for their own sakes they take all due diligence. Besides, the experience of the working of the Act with reference to railway systems, where there has been no contracting out on the part of the men, does not reveal any greater security than in those railway systems where there has been such contracting out.

The liabilities under the Act of the companies to railway servants, as we have already seen, are more extensive than those which have reference to other descriptions of employment. This has been recognized in the railway insurance schemes which have been adverted to above, because, whereas for the most part the contributions by the masters to the colliery insurance schemes are in the general case seldom more than one-fourth of the men's contributions, in the railway schemes, as we have seen, the contributions of the Company are 45 and 75 per cent. respectively. No doubt the much greater number of the London and North-Western Railway Company's employés to some extent accounts for this disproportion.

On the whole matter it seems to me to be so clearly for the advantage of the men—and I can also see that it is for the advantage of railway companies in preventing unpleasantness through litigation or otherwise between them and their employés, the existence of which it is to be remembered might not impossibly give rise to public danger—that I am strongly of opinion that in connection with the railway system it is undesirable to make contracting out of the Act null and void. As, however, it has been recognized that the possible rights of action discharged by railway servants are of a more extensive character than those possessed by ordinary workmen, I submit that the contributions to insurance funds to be afforded by railway companies shall be a larger proportion than those recognized in the case of collieries and mines, as a fair equivalent for the discharge of the rights of workmen under the Act. I submit then (1) that contracting out of the Act as between

railway companies and their employés shall be permitted on the company contributing not less than one-half of the whole annual contributions to an insurance fund of which the men contribute the other half, to meet aliment in case of disablement, and compensation to representatives in case of death through accidents from whatever cause arising ; and (2) that such scheme shall not be held to bar action under the Act unless it has been approved by a Secretary of State, or some official appointed for the purpose, as being a reasonable scheme in all respects for the men, and being on a sound financial basis.

Before leaving this subject there is one point which can hardly be passed over, and that is whether the railway companies should have power to make it a condition of employment that the men should contract out of the Act, as in the London and North-Western scheme, or it shall be permitted to be optional, as in the London and Brighton and South Coast scheme. It appears to me, having regard to the financial question, and to the considerations pointed out by the witnesses, as to the extreme desirability of preventing litigation, not only from the railway point of view but from the public point of view, that it is expedient that if the insurance scheme of the railway be officially recognized as a reasonable one in the interests of the men, it is only just that the railway company should be entitled to refuse to give employment, except upon a condition of discharge by the employés of their rights under the Act in consideration of the more than equivalent advantage given to their employés by the Company.

As previously indicated, the only trades or works



which have gone about systematically the establishment or enlargement of these insurance funds in view of the Employers' Liability Act have been mineowners and coalmasters, railway companies and engineering establishments, and their employés. There is also in the Report of the Committee evidence as to one alkali manufactory, that of Chance Brothers, Birmingham, employing 600 hands, whose workmen have contracted out of the Act on a payment of £100 proportionally to the workmen's £50 to an accident fund. I do not think it would be unjust if the opinion be arrived at that as a general rule contracting out of the Act shall be null and void, and to make the exception to the general rule applicable only to the cases of railway systems, coals and mines, and engineering establishments. If, as matter of fact, subsequent to the passing of the anticipated Act any trades take steps with reference to the establishment of voluntary associations to meet the case of compensation for accidents from whatever cause arising, then application might be made to Parliament to recognize the masters' contribution as justifying contracting out of the Act.

Before passing from the subject of contracting out of the Act and the suggested exception to the general prohibition of such contracting out, I think it may be interesting to refer to the law and practice of foreign countries as gleaned from the answers given to the circular-letter addressed by Lord Rosebery to Her Majesty's representatives, and previously referred to. Lord Rosebery directed particular attention *inter alia* to (1) the question of whether in the respective countries to which circulars were sent the employers

and workmen were able to contract outwith the provisions of the law? and (2) what insurance funds were in existence as against accident, and to what extent the employer could reduce his liability by contributing to these?

I propose to take up the replies of the representatives of the different countries in the order given in the blue-book referred to.

FRANCE.—An elaborate and very interesting report as to the law of France is given by M. Treitt, the legal adviser of the British Embassy in France. The law in France as to the responsibility of employers is embraced in articles 1382 to 1386 inclusive of the Civil Code. By article 1384 the master is responsible for injuries occurring to his servants, either through his own fault or through the fault of a servant. The doctrine of *collaborateur* seems to be recognized only to a very limited extent. M. Treitt says:—"The employer is responsible with reference to all his workmen indiscriminately. There are no classes among the workmen. The responsibility of the employer is never absolutely relieved. If the injury arises from the action of a fellow-workman, it lies with the Judge to estimate the facts absolutely, and to assign to each person his share in the responsibility." The most important paragraph, however, in M. Treitt's report as to the points I am dealing with is the following:—"Employers and employed are allowed to make such contracts as they please, even outside the provisions of the law; but according to the constant and well-established interpretation of the law the Judges have the right to annul such contract if they are too prejudicial to one of the contracting parties: they are then

leonine contracts, and are held to have been signed under an irresistible constraint, such as main force or the necessity of obtaining work."

While, however, all questions relating to the responsibility of employers are still regulated by the common law, various proposals have been brought forward from time to time in the Chamber of Deputies as to amending the law. Proposals have also been brought forward in the Senate. These proposals M. Treitt says are mainly these (1) to impose upon the employer "the obligation to indemnify his workmen in case of accident, even if the employer should have nothing whatever to do with the cause of the accident. This has been called the forced contribution towards compensating professional risks; (2) obliging employers to have their workmen insured, the workmen contributing at least a third of the insurance; (3) determining beforehand the scale of compensation to be paid to the workmen and their representatives; and (4) avoiding all delays in the payment of the indemnity."

There is also contained in the new proposals an article forbidding workmen and employers to make contracts contrary to the provisions of the proposed law, under pain of such contracts being held null and void.

As regards the law and practice as to insurance funds against accidents, M. Treitt states:—"In France insurance is not general, and what insurance funds there are have been almost wholly established through the intermediary care of employers." I do not gather from the language used what are the proportional contributions of the employer and workman respectively to such funds.

GERMANY.—The report with regard to the German law, which is very instructive and distinct, was drawn up by Mr. Arthur Leveson-Gower, second secretary to Her Majesty's Embassy at Berlin.

The law as to workmen's liability in Germany is dependent on special legislation. The first law passed on the subject was promulgated so far back as 7th June, 1871. This law was passed, it appears, not only for the benefit of workmen, but also for that of members of the public injured through the working of railways, mines, quarries, and manufactories. The law, however, now stands upon the "Unfallversicherungs-Gesetz" of 6th July, 1884. "The effect of the law," says Mr. Leveson-Gower, has been "that employers for their own protection, and in order to spread the risks over as large an area as possible, have been grouped by law into trade associations, termed "Berufsgenossenschaften." The statutes of each such "Berufsgenossenschaft" must receive the sanction of the Government. Each branch of trade or industry in which the risks are similar and equal (for instance the iron and steel trade, chemical industry, textile industry, sugar, or tobacco manufactories, etc., etc.) has been formed by law into a "Berufsgenossenschaft" for each such branch of industry within a certain geographical district for the purpose of compensating workmen injured in the service of the employer who belongs to the respective district, and belongs therefore by the law to the respective association. Some branches of industry (for instance the chemical industry, gas and water companies, etc., etc.) have formed only one "Berufsgenossenschaft" for the whole of Germany. Some other branches (the iron and steel trade for instance)

have formed several "Berufsgenossenschaften," each of them for a certain geographical district. The total number of these "Berufsgenossenschaften" is at present 62, each having its own administration.

These "Berufsgenossenschaften" are therefore, in point of fact, large insurance associations, the funds for which are contributed by the masters, and which take up the liabilities which otherwise would be borne by each individual master for all accidents happening in their respective businesses. These associations pay compensation in all cases of accident occurring to a workman when engaged in his work. "The only cases," says Mr. Leveson-Gower, "in which the employers would be relieved from liability are, first, when the injury suffered by the workman has no connection at all with the execution of his duty in his practical work, as, for instance, when a workman is injured by a fellow-workman in a quarrel; or, secondly, where a workman is convicted of wilfully injuring himself or of wilfully causing the accident by which he has been injured, and thereby loses all claim for himself or for his family for compensation." It makes no difference in the question of liability whether the man in fault is a *collaborateur* of the man injured or not. If, however, there be gross and criminal neglect on the part of the employer or the working manager, as affirmed by a criminal Court, the employer or such working manager respectively must disburse to the "Berufsgenossenschaft" the amount that has been paid by it to the injured workman or to the representatives of the workman killed.

The "Unfallversicherungs-Gesetz" of 6th July, 1884, provided (1) compensation for an injured workman;



(2) pensions to widows of workmen killed in the service; and (3) for maintenance for children of a workman killed till they attain a certain age.

In answer to the sixth question by Lord Rosebery the following is the reply:—"Employers individually and as trade associations ('Berufsgenossenschaften') are positively forbidden by law to restrict by contract or otherwise rights and claims given by law to their workmen. All stipulations of such a kind would be null and void."

The workmen's right to compensation does not arise according to German theory *ex contractu*, but proceeds upon the assumption that it is a right of a public character and *ex jure naturali* that a workman injured in his master's service should look for reparation from the master.

Lord Rosebery's eighth question is answered thus:—"The liability of the employer begins from the fourteenth week after the accident. For the first thirteen weeks the injured workman is supported from the funds of the 'Krankenkassen' (sick funds). According to the 'Krankenversicherungs-Gesetz,' 15th June, 1885, contributions to sick funds are compulsory. To these funds the employer contributes in the proportion of one-third, the workmen of two-thirds." Thus in an indirect way the workman does make a small contribution to the payment for accidents.

As yet the law is not applicable to seamen; but otherwise, speaking generally, it may be said to embrace all workmen in Germany.

The law, therefore, goes a great deal farther than the present law of England goes in favour of the workmen; and I suppose in no country during the last ten

years has there been such successful progress in the development of trade as in Germany.

AUSTRIA.—Austria has no special legislation with regard to liability of employers to compensate workmen injured in service except with regard to railways. A law was passed in 1869 by which liability is presumed against railway companies with regard to accidents happening to their servants. The report to Lord Rosebery is furnished by Mr. Phipps, secretary to the Embassy at Vienna, and he says with regard to railways:—"The employer can only relieve himself from such liability on affording proof that the accident was caused by *vis major*" (synonymous with our *damnum fatale*).

With regard to the sixth question Mr. Phipps says:—"Employers and workmen are not permitted to contract themselves out of the whole or any portion of the provisions of the law without the consent of the communal authorities (acting in this respect like our poor-law officials)."

In answer to question eight Mr. Phipps gives some interesting details as to the insurance societies introduced by employers and workmen. He notes that a project of law had been submitted to the Austrian Legislature, "according to which provincial or local assurance societies will be compulsorily insisted in on a system of co-operation between the heads of industrial and mining establishments and their workmen, by means of which the liability of employers to compensate workmen injured in their service will be covered; and, although the modifications proposed by the opposition in committee on the subject are of some importance, there is every probability of it becoming law." By this proposed

law the master is to contribute ninety per cent. and the workmen ten per cent. of the premiums. Mr. Phipps commenting upon the proposed law says, after giving details of the scheme:—"It will therefore be seen that this proposed law excludes State assistance and makes both employers and workmen contribute to the premiums, according to both a share in the administration of these co-operative societies. Instead of leaving to the employer the free initiative it imposes a legal obligation on him."

Sir A. Paget, writing to Lord Rosebery on 3rd June, 1886, reports that the bill referred to by Mr. Phipps had been carried by a small majority, but he states:—"The German Liberals had proposed that the provisions of the law should be extended to the whole class of agricultural labourers and to artizans employed in small trades, but ineffectually, so that the benefits of the law would only embrace about one-sixth of the Austrian labouring classes, viz., those employed in large factories."

ITALY.—Projects of legislation (it appears from Mr. Beauclerk's report forwarded by Sir J. S. Lumley to Lord Rosebery) have been mooted before the Italian Parliament for a considerable time in connection with employers' responsibility; as also a scheme for national insurance against accident. So far back as 19th February, 1883, bills were brought before the Chamber of Deputies on the subject. A bill on the subject was only passed by the Chamber of Deputies on 5th July, 1885, and at the date of Mr. Beauclerk's report (10th April, 1886) was still under discussion by the Senate. By this measure, in the form in which it passed the Chamber of Deputies, it was provided by article 1:—

“Contractors and workers (*i.e.*, managers) of railways, the owners of urban and rural properties in which new works or repairs are made, and the contractors or workers of the same, the owners or workers of mines, quarries, and foundries, and the engineers and architects who direct the works, are always materially responsible (and through them their employers) for injury to the bodies or health of their workmen caused by accidents on the railroads by the total or partial destruction of buildings, by earthquakes, excavations, explosions, or any similar misfortune. Such responsibility ceases when it is proved that the accident has occurred *solely* by the negligence of the person injured, by pure misadventure, or by unavoidable circumstances.”

It is to be observed, by this article the defences of “independent contractor” and of “contributory negligence” are not available. But, on the other hand, contrary to the law of Germany, there is no liability where the accident happens without fault on the part of the employer or some person in the employment.

By article 6—“The persons responsible under article 1 cease to be liable when they have at their own cost insured their workpeople against all kinds of accidents, including those arising from their own negligence, from pure misadventure, or from unavoidable circumstances, saving cross actions between persons jointly responsible, or against those liable for the payment of the premiums of insurance. The Workmen’s National Insurance Fund may provide, with the consent of Government, for special forms of insurance for casual workmen engaged in the works mentioned in article 1. In all cases the amount of insurance may

not be less than that laid down in the following article."

It may be useful in connection with the question of what the fair amount is in the way of insurance compensation to refer to the provisions of the Italian Bill.

Article 7 provides, "In case of the death of the injured person, the sum insured for, according to the preceding article, can never be less than—

"(1) Seven times the yearly wages if the workman leaves parents and a wife with more than three children under age.

"(2) Six times the yearly wages if he leaves a family as above with three or less than three young children.

"(3) Five times the yearly wages if he leaves a wife with more than three children under age, or only more than three such children.

"(4) Four times the yearly wages if he leaves three or less than three young children, with or without a wife.

"(5) Three times the yearly wages if he leaves only a wife, without children and parents.

"(6) Twice the yearly wages if he leaves only a wife, without children or only parents.

"If in consequence of the accident the workman is absolutely and permanently incapacitated for work, the compensation may not be less than eight times his year's wages. In case of partial and permanent incapacity, compensation will be proportioned to the extent of such incapacity within from 20 to 80 per cent. of the compensation insured for absolute incapacity. In case of temporary incapacity the amount insured must correspond to the daily wages, and must be paid during the



whole period of illness up to a maximum of 360 days. By agreement between the injured person and the insurance office there may be substituted for the payment of a capital sum a temporary or life income equivalent thereto."

Although such a basis as this may not be that which would fall to be adopted in Great Britain in the event of contracting out of the Act being permissible where the masters contribute along with the workmen to a benefit society which should allow compensation in all cases of accident, it is necessary that there should be some basis and some definite rules as to the amount of compensation to be afforded in different cases should the second and third resolutions of the Committee be practically carried into effect. I submit that it would be desirable that these should be fixed by Parliament in an analogous, though not necessarily the same way as that proposed by the Italian Bill.

On 1st June, 1885, a Bill entitled "Law for the Institution of a National Fund for Workmen" was laid before the Chamber of Deputies. It is a long Bill, containing no less than twenty-four articles. Among these I may note article 5, by which it is *inter alia* provided that the administrative staff of a fund worked by a society must be approved by the Government. The funds of the society established are to be subsidized by Government.

By article 19 the pensions of the societies cannot be sequestrated. As this question of national insurance is a very important one in connection with employers' liability, I have thought it well to print in the Appendix the provisions of this Act.

By article 13 of the first-mentioned Bill renuncia-

tion or part renunciation of the benefits of this law is "null and void."

Italy, therefore, as will be seen, is progressing rapidly in the way of legislation on the general lines indicated in the resolutions of the Committee.

BELGIUM.—In Belgium there is no special legislation, and the responsibility of employers there is regulated by article 1147-8 and 1382 to 1384 inclusive of the Civil Code. By the last of these articles, "every person is responsible not only for the injury caused by his own acts, but also for that caused by the act of persons for whom he ought to be responsible or arising from appliances in his keeping. The employer is responsible for all accidents which can be traced (1) to the fault of an overseer set over the workmen, or of any person who is in the business in a general position of authority, or (2) to a defective condition of machinery, plant, or permanent appliances of the work. The report as to the law, which was prepared by M. Gosselin, states that a movement is now on foot to make employers responsible for all accidents. It is not permitted for employers and workmen to contract out with reference to employers' liability. The law as to collaborateur does not seem to rest on a very clear footing. M. Gosselin says the tribunals in each case have to decide whether the fact that a workman was injured by the act of a fellow-workman makes any difference as to the employers' liability.

As to insurance or benefit societies, it is stated that there are a large number of these throughout the country, but "employers of labour subscribing to these societies do not thereby in any way diminish their

responsibility for accidents to workpeople injured in their service." This, indeed, would almost seem to follow of necessity where there is no special legislation, because otherwise the contributions of the master must be *ex gratia*, and cannot form part of a contract when contracting out of the law is null and void.

NETHERLANDS.—Netherlands has no special legislation on the subject. By article 1403 of the Civil Code, masters and such persons as delegate others to take charge of their business are responsible for the damage caused to their servants and subordinates in the duties on which they have employed them. The report does not seem to me very distinct, but I gather from it that masters are not in the general case liable to their servant for a servant's fault unless the latter is to be regarded as a delegate.

As to insurance during the last few years, there has been a movement in the direction of workmen insuring themselves against accidents occurring in the exercise of their calling, "but this," says M. de Karnebeek, "is not extensively resorted to." The sixth and eighth questions of Lord Rosebery are not specifically answered.

SWITZERLAND.—There is special legislation in Switzerland which has been in force since June, 1881. The liability of employers is limited to those classes subject to the provisions of the Factory Act of date March 3, 1877. By this Act it is provided "every industrial establishment is considered a factory, and as such subject to the provisions of the present law, where a number of workpeople are employed regularly, and at the same time in enclosed rooms outside their own dwelling." The employer is liable where accident

is occasioned to one of his servants through the fault of any person in his employment, no difference being drawn where the person through whose fault the accident has come about is or is not of a superior grade to the injured man. Employers and workmen by article 10 of the Act cannot contract themselves out of the law.

Insurance prevails pretty generally. "If the employer has contributed to the extent of one-half to the insurance funds," says Mr. Angst, British Vice-Consul, from whose clear report I take the above, "the whole amount paid to the injured workmen or his heirs out of such funds is to be deducted from the compensation obtained from the employer. On the other hand, if the employer has contributed less than one-half, such a sum only is deducted from the compensation as stands in proportion to the employer's contribution. The employer can claim such deductions only where the insurance to which he has contributed comprises every kind of accident and illness." At the time the report was sent (May 13, 1886) there was a movement to extend the liability of the employers, the most important point of which movement was to render employers liable in a number of other dangerous industries (builders, workers in quarries, carriers, miners, etc.).

As to SWEDEN and NORWAY, a letter is printed from Count Ehrensvärd, enclosed to Lord Rosebery, which, however, is to the effect only that a Royal Commission entrusted with the work having not yet reported to the king, he was not able to give the information desiderated.

UNITED STATES.—The common law of America is, I believe, with regard to this matter the common law of

England. "The employer," says Sir L. S. Sackville West, who furnishes the report to Lord Rosebery, "is now liable under the common law for two classes of injuries caused by fellow-workmen, when he has directly interfered in the act which caused the injury ; and when, by his negligence in selecting, he has employed an incompetent workman. In all other cases, except where special legislative restriction exists, he is not liable for injuries to co-workmen, unless by special contract he assumes to become liable." Sir L. S. Sackville West says, his report being dated 9th June, 1886, that there is a movement on foot "to make the employer also liable for all injuries caused by his authorized agents in the legitimate performance of the duties which he has prescribed, such regulation to apply to industrial works and railroads." In other words, a movement to assimilate American law to the law given effect to in the Employers' Liability Act of 1880, with regard to the responsibility of employers for their superintendents. As to the prevalence of insurance the information given is very vague. "The Commissioner of Labour informs me that a system of insurance against accident by workmen themselves prevails to a certain extent in the United States, but to what extent he is unable to indicate. Such a system is, however, in practical work on the Baltimore and Ohio Railway, where the Company guarantees a certain rate of interest upon a given capital which has been set aside by it for the benefit of an assurance association among the men. It is not made compulsory, but in fact is so because of the inability to secure employment, unless the workmen participate in the system."



The result of a general review of the different existing and proposed laws of the different countries is, I think, to show that Great Britain will not be going to any extravagant extent in the way of extending liability of employers in acceding to the second and third resolutions proposed by the Committee.

The fourth resolution of the Committee was as follows :—“ *Wherever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or wherever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer in respect of injuries sustained by any of the workmen of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if such ways, works, machinery, or plant be the property of or furnished by the employer, and if such defect arose or had not been discovered or remedied owing to the negligence of the employer or of some person entrusted by him with the duty of seeing that the ways, works, machinery, and plant were in proper condition. Provision should be made to reserve any right of action which any workman may have against his immediate employer, or any right of action which the principal employer may have against his contractor or sub-contractor.*”

Mr. Burt's Bill, as will be seen (p. 334), has no reference to this point, but Mr. O'Connor's Bill in its third section contains an express provision dealing with

the matter. That provision will be found printed at page 332, and it is unnecessary therefore to repeat it here, but a reference to its terms will show that the fourth resolution of the Committee is analogous, although not exactly a reproduction of the clause proposed by Mr. O'Connor.

The first question which presented itself to my mind in connection with this provision in Mr. O'Connor's Bill was why, in a Bill brought in avowedly in the interests of the workmen, it should not have been conceived in the direction of further liability on the part of the employer or principal contractor. Both the resolution and the terms of the provision itself limit liability to cases of accidents occurring through the defective plant, etc., supplied by the employer or principal contractor. Mr. O'Connor's Bill proposes that in all cases of accident in consequence of defective plant, etc., the employer or principal contractor shall be liable. The resolution proposes that the employer shall be liable where the plant, etc., is his property, and if the defective state thereof "arose or had not been discovered or remedied owing to the negligence of the employer or of some person entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." In other words, that the employer shall be liable under sub-section 1 of section 1 of the Employers' Liability Act in spite of sub-contract.

Now the main objection which the "workmen witnesses," if I may so term them, had to the defence of "independent contractors" was that masters in many cases gave out sub-contracts to men of straw, or, at all events, to men as to whose pecuniary condition they

had made no inquiry whatever, with the object of escaping liability for accident, both at common law and under the Employers' Liability Act. A strong body of evidence to this effect was led before the Committee. I have no intention of going into that evidence at length, but as a sample of the description of evidence as to this point, I may refer in the first place to that of Mr. Shipton, who spoke as a representative of the men in connection with various trade societies having to do with the building trade. In answer 388, the question being put to him whether there was in the building trade anything of special interest with regard to sub-contracts, replied, "Yes, clause 3 of Bill No. 60 in itself is so far good, but we should like to see it carried a little further. Since the passing of the Employers' Liability Act, 1880, the master builders throughout the country have largely increased the system of sub-contracts, and most of those sub-contractors being men of straw, by sub-letting their works in this way the masters escape the responsibility of the Act. What we desire is that not only shall the primary contractor be responsible under the Act when he allows his own scaffolding to be used, but that he should be responsible under the Act, under all circumstances, jointly and severally with the sub-contractor." Mr. Shipton later on explains, "A large employer will take a contract at first hand, and then in order to escape the responsibility of the Act will sub-let this work to a man who has no position . . . The sub-contractor will himself hire the scaffolding from some professional man who lets it out, and the result is that the scaffolding is never in good condition—it is exposed to all sorts of weather, and is not good. The primary

employer not being responsible, does not care much, and if any accident occurs the sub-contractor disappears altogether and can nowhere be found, then the chief employer or contractor is not responsible."

Now in connection with the same matter, and illustrative of the extreme desirability that workmen should have no difficulty in knowing to whom they can look for compensation in the event of accident, Mr. Shaen, a member of a firm of London solicitors, with considerable experience of the working of the Employers' Liability Act, makes this statement:—"I would just observe as a fact, which illustrates the importance of dealing with this matter, that it is often extremely difficult for workmen to know who their employer is. In cases of large building operations and engineering works, the workmen see that there is something going on; they walk up to the place and say, 'I want a job.' The only person they see is a foreman, and the foreman says, 'Yes, go on and do it,' and if the workman says, 'Will you be good enough to tell me to whom I am to look in case of an accident?' he would say, 'Good morning, you had better go, you're a disagreeable sort of a man,' and therefore unless it was provided for in some other way, that is to say, if you do not make the employer answerable through his sub-contractor, then I think that some clause of this kind would be necessary, that every workman taken on a job should be entitled to consider himself employed by the principal employer, whoever he is, unless he has distinct notice given in writing at the time of his engagement that he is employed by somebody else. If the Bill passes in the shape in which I hope it will, the principal employer will not be able to escape his liability, but

if you leave any loop-hole for him to escape his liability by appointing a sub-contractor, then if he intends to avail himself of that loop-hole, it ought to be a very clear understanding between him and the workman."

Now, as I have said, there is a considerable amount of evidence in corroboration of Mr. Shipton's testimony. That is to say, that since the passing of the Employers' Liability Act, and for the purpose of evading personal liability throughout England at all events, (there is, I think, no evidence as to Scotland with reference to this point), principal contractors have given off sub-contracts to men who, they knew, were without means, or with regard to whose means they knew nothing and cared to know nothing; while, as regards Mr. Shaen's evidence, it at once strikes ordinary common sense that it is exactly what must happen, and what frequently does happen in the circumstances supposed. Mr. Bird (Qu. 4935-38), however, gives a contradiction to Mr. Shipton on this point.

I confess that it appears to me as only fair that what is suggested by Mr. Shipton should be adopted, namely, that there should be joint and several liability on the part of contractor and sub-contractor. Assuming it to be the fact, as indeed I think is proved by the evidence, that contracts are frequently given off to men of straw, it is to be observed in the first place that the workman has no means of ascertaining in the usual case the pecuniary position of the sub-contractor who employs him, whereas the principal contractor can unquestionably, though perhaps with some little trouble, ascertain it. He does not require to give off the sub-contract until certified as to the pecuniary position of



the man with whom he makes it. If certified of that position, it may be asked in the second place, "Is he exposed to any real hardship?" The answer to that must, I think, be in the negative; for supposing a joint and several decree be given against both him and the sub-contractor, then if the accident be one arising from the fault of the sub-contractor or of a superior workman for whom the sub-contractor is responsible, then the principal contractor can always make good his claim of relief against the sub-contractor should the decree have been enforced at the instance of the injured workman against the principal contractor.

I think, therefore, the logical result is that there should be joint and several liability. But this brings me back to the inquiry propounded at the outset of the remarks on this subject—Why the proposal in Mr. O'Connor's Bill and the resolution, or at least in the former, seeing that it was brought forward in the interests of workmen, should not promulgate the theory of joint and several liability? Why the silence in Mr. Burt's Bill as to this point? It has been suggested to me that the Bill is really out of consideration for the best interests of the workman. It is pointed out that if such provision were made law the result would be that the principal contractor would not give off sub-contracts except to men of ascertained capital; and that as in the usual case even the better class of workmen have no capital, they could no longer expect to get sub-contracts of any kind, and that this system of sub-contracting is a recognized means whereby intelligent workmen can mount upwards and onwards to a better position in the world.

I have no means of knowing to what extent there is

substantial ground for this contention, although I would say that it is a matter for the decision of workmen themselves, speaking of course so far as Parliament is concerned through their representatives. But as a matter of right, I think the decision should be left to themselves, being clearly of opinion that logically it should not be left to principal contractors to evade the responsibilities attached to them under the Employers' Liability Act by making sub-contracts with men of straw.

The fifth resolution of the Committee is couched in the following terms:—"So much of section 8 of the Act as defines the expression 'person who has superintendence entrusted to him,' as 'a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour,' should be repealed."

The resolution contemplates an important alteration in the existing law. It may be remembered that by the second sub-section of the first section of the Act, the employer is responsible for personal injury caused to a workman "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence." The resolution of the Committee apparently does not contemplate any alteration of the law in connection with the substantive provision in this sub-section, but by sweeping away the interpretation given in section 8 of the Act as to the meaning of a "person who has superintendence entrusted to him," it is contemplated there shall be a very material amplification of persons for whom the employer shall be responsible.

I propose, however, in the first place, to deal with the question of whether it is desirable there should be any amendment of the law with regard to the substantive provision itself, before proceeding to consider the alterations suggested in the Committee's Report.

In the first place, there are two points to be adverted to as deserving of attention in the words of the second sub-section *per se*. (1) The negligence for which the employer is to be responsible, if injury has resulted, is that of a superintendent; and (2) it must also be negligence whilst in the exercise of such superintendence. Now with regard to the first of these points, no doubt the effect of the sub-section will be very materially changed by the abolition of the interpretation clause of the Act at present in force, but it would still leave grave dubiety as to who fell to be regarded as a superintendent. According to the interpretation attached to the word (of course so far affected by the interpretation in section 8) by Courts of Law, superintendent means a manager or agent, and not a mere workman, having a certain superintendence over workmen or machinery but still doing some manual work. Assuming the law to be changed as proposed, is there to be no guiding definition of what constitutes superintendence? We have, for instance, seen that the superintendence contemplated may be a superintendence over things (pp. 216, 217), while at the same time there must be in combination with such control a certain power of authority. The present Act indeed, it seems to me, with regard to what shall be held to constitute a man a superintendent in the sense of the Act over things, is itself deficient, and I submit that in the amending

Act what is required to constitute this should be made definite and distinct.

But again it is to be observed, the resolution apparently intended to retain the third sub-section of section 1, that is to say it does not propose to hold that every person to whose orders a workman is bound to conform is to be henceforward a superintendent in the sense of the statute. At present there is a very important distinction between an employer's liability on account of the negligence of a superintendent and on account of that of a person to whose orders an injured workman is bound to conform. In the first named case, as we have seen, the employer is responsible for any act of omission or commission of a superintendent whilst in the act of superintendence where there has been negligence on the part of such superintendent, but in the latter case there is only liability if the superior workman has been guilty of negligence and the accident complained of has come about through the actual order given by the superior workman having been conformed to by the inferior workman. The Committee, I infer from the retention of the words "whilst in the exercise of such superintendence," do not intend absolutely to sweep away this distinction.

(2) This leads me to the second point, viz., as to whether there should be any alteration in the words "whilst in the exercise of such superintendence." We have previously seen that doubts and difficulties have been suggested in the construction of these words. In the case of *Shaffers v. the General Steam Navigation Company* (48 L.T. 228) it was argued that, assuming the man by whose fault the accident had come about was a superintendent in the sense of the Act, still the

superior workman had caused the accident, not in his capacity of superintendent but by a manual act, and this fact put him in the category of a fellow-labourer. Though this was perhaps not the ground of judgment Messrs Roberts and Wallace seem to consider the argument sound. I pointed out that the case of *Osborne v. Jackson & Todd* (48 L.T. 612) was against this view, as also that Scotch authority was to a contrary effect. Still, as I have said, these words have led to considerable difficulty in construction. I submit that the amending Act should put this matter beyond doubt, and I suggest that the employer should be made expressly responsible for the superintendent's act, whether it be a manual one or not, provided there was negligence on his part.

But as to the substantive clause itself, I submit it will be wholly wrong to leave the word superintendent to be interpreted by the different Judges throughout the kingdom. The word ought to be expressly and distinctly defined in the Act itself.

Turning to the resolution of the Committee, there can be no doubt that the words which it is proposed shall be repealed have led to very great confusion. There are two points—(1) whose sole or principal duty is that of superintendence, and (2) the superintendent must be one not ordinarily engaged in manual labour. These two points, however, substantially run into each other, because if the superior workman's time is not wholly or principally taken up in superintendence in the ordinary course, the remainder of his time would be occupied in manual labour. I therefore propose to take up and deal with these two points together.

In my own experience the words "not ordinarily



engaged in manual labour" have led to frequent argument and difficulty. It is, I think no one will dispute, extremely desirable that in an Act intended to benefit working men there shall be if possible no dubiety as to construction. Is a man a superintendent who has charge of a job with half-a-dozen men under him, but gives a hand in the execution of the work to the extent of a third, or a half, or a quarter of the time respectively? Is a fireman in a pit a superintendent in the sense of the Act? These and similar questions are not such as should be left to the varying interpretations of the hundreds of Judges throughout the kingdom who have to decide them. The Committee, as we have seen, propose to abolish these words altogether. I do not object, but I say that it is imperative that Parliament should decide who in the sense of the Act is to be a superintendent.

That the interpretation of the word superintendent, or rather the subtractive definition of it, if I may so express myself, in section 8 has led to hardship and injustice, is beyond doubt. With regard to this point it may perhaps here not be out of place to refer to the evidence of two witnesses examined before the Committee, and whose experience of employers' liability cases entitles them to speak with authority. In the first place I take the evidence of Mr. Ruegg, who, in answer to the question—"The section proposes to repeal the present definition of a 'person who has superintendence entrusted to him' as 'a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour,' now I would ask you whether that proposed repeal would, so far as you have been able to judge from your own prac-

tice, be calculated to produce any substantial injustice?" replied—"No, I think not. I think that the section as it now stands produces some injustice, and for this reason: it seems to me that if the superintendent has superintendence, and is guilty of negligence in one of his acts of superintendence, and not in one of the acts of manual labour, the fact that he sometimes performs manual labour ought not to be taken into account. The effect of it is this: that if a walking foreman, a man who does nothing but superintend, is guilty of negligence, the employer is liable, but if he is working foreman, and still has superintendence, and in the exercise of his duties of superintendence is guilty of negligence, the employer is not liable unless the accident is occasioned to a man over whom he has superintendence at that time; that is, unless he comes under the third sub-section he does not come under the second section. I think I can make it clear by illustration. Suppose a foreman who does nothing except superintend directs a particular work to be done in a particular way negligently, and that causes an accident, the employer is liable; but supposing he directs the same work to be done in the same particular way, and supposing he sometimes works with his hands, then this result would follow, that if one of the men assisting him was injured he perhaps might recover, but if he injured another man such man would have no right to recover, because the employer would not be liable for such foreman's negligence under the second sub-section, or under the third sub-section, because the man who was injured was not under his orders at the time." In answer to a further question, "Might I say, in your opinion, this definition of the expression 'person who has superin-

tendence entrusted to him ' should be omitted from the Act?" Mr. Ruegg said—"I think the words which define the words as being a particular person 'not ordinarily engaged in manual labour' should be omitted. The employer would still have the words, the negligence must be negligence whilst in the exercise of superintendence. That would not be making him liable for the ordinary negligence of the man, but only while the working foreman was guilty of negligence in the exercise of superintendence."

Then, again, Mr. Jones, M.P., in connection with the proposal to abolish the words "not ordinarily engaged in manual labour," and in answer to the question—"Is there any particular alteration in this proposed clause (section 8 of Mr. O'Connor's Bill quoted *supra*, p. 333) which you think might be adopted with advantage?" replied—"I think that that provides for what very often operates very harshly, namely, the provision that he is not a person ordinarily engaged in manual labour; there is no doubt that very often there are cases in which a man has great authority entrusted to him by his employer, and at the same time is a person who is, according to the view of the Court, a person who is ordinarily engaged in manual labour; and I think that it is very expedient that at any rate that qualification should be removed, and in that respect I heartily concur in the amendment."

Some portions of Mr. Jones' evidence may be construed to the effect that he would be inclined to extend the definition of superintendence to every man who would at present fall under the category of the third sub-section of section 1. To that extent I would not be prepared to go. To hold that a superior workman,

working along with two or three other men, and paid a few shillings weekly more than they, should be held responsible, and through him his master, for having failed to take some measure of precaution which would have prevented an accident, would, I think, be going too far.

I see that there is a difficulty in laying down exactly what ought to constitute superintendence. Mr. Jones, I observe, found the same difficulty, but submitted, as I do, it was a thing which ought to be done by Parliament. There are different points of view from which, it may be argued, the word ought to be regarded in different trades and industries. It would take up too much space to discuss the subject at length here, nor could I venture to express any opinion upon it without the greatest doubt and hesitation, but I submit that it is extremely desirable, if not absolutely necessary, that the amending Act should put beyond doubt who “a superintendent” shall be, and this having been done, I submit that the second and third sub-sections of the existing Act might be conveniently amalgamated in one section, which should be something to the following effect:—The master shall be responsible for *personal injury caused to a workman by reason of the negligence of any superintendent in the service of the employer, and who the injured workman at the time of the accident had reasonable grounds for believing to be acting within the scope of his authority, as also for personal injury caused to a workman through the negligence of a fellow-workman superior in grade to himself, through his having conformed to an order given by said superior workman, he being bound to conform to said order, and said injured workman having reasonable*

*grounds for believing that such order was within the scope of the said superior workman's authority to give.*

The sixth resolution of the Committee is as follows:—  
*The Court should have power to allow an action for compensation to proceed though no notice of injury should have been given, or notwithstanding any insufficiency of the notice actually given, if the Court should be of opinion that there was reasonable excuse for such want of notice or defective notice.*

I do not think it will admit of denial by any one who has considered the case law on the subject since the passing of the Employers' Liability Act, that it is eminently desirable that there should be some alteration of the rigidity of the law as to notice. It is easy to conceive cases of gross hardship arising from the nature of the accident. Thus, for instance, take the case of a man injured about the head in such a way as to become unconscious, and to lie in an absolutely helpless state till beyond six weeks after the accident. He is perhaps a stranger; at all events no one has given notice for him. He has a good ground of action for injuries which would furnish a valid claim under the Employers' Liability Act, but the failure to give notice is an absolute bar to any action founded on the statute. That such a result would be a miscarriage of justice, no one I think will dispute. That cases of this or of a similar kind have occurred in practice, the evidence of Mr. Ruegg shows. He says (answer 514):—"I know of one case, particularly, of a man being very seriously injured, and being taken up at once in a smashed condition to the hospital and encased in plaster of Paris or something of that kind, and he did not



move hand or leg for six weeks. When he came out, no one had given notice. The case was before me; I think he had a very strong claim, but he lost it. The man was absolutely unable to move for six weeks."

But cases of this kind do not see the light, because it is absolutely certain that without written notice within six weeks no action under the Act can lie, and such circumstances as those detailed by Mr. Ruegg only emerge in the light of a Commission or a Parliamentary Committee. There are, however, sufficient cases in the books to show that the provisions as to notice in the Act work harshly. At one time I was inclined to be of opinion that the law should be modified only to the extent, or something like it, of the proposal embodied in the resolution. I have now, however, come to be of a different opinion. I support the view that the provision as to notice should be wholly swept away. It is in the first place a provision entirely peculiar to this statute. That, however, is not *per se* a valid objection to its being made compulsory. The Act itself, it is said, was the imposition of a new species of liability upon the master, and it is necessary, it is argued, to impose protective provisions to prevent abuse. I agree with this, if it is capable of proof that there is reasonable ground for believing that there will be substantial abuse. After consideration, I have come to the conclusion that there really is no tangible risk of abuse.

Let us see what those supposed possibilities of abuse are. So far as I can discover from the evidence led, and consideration on my own part, these amount practically only to three—(1) that wholly groundless actions may be raised—I mean actions where absolutely no

injury has been inflicted—with the object of extorting money ; (2) that, assuming some injury has been inflicted, if the master be not certiorated at an early period after the accident that an action is threatened, he may allow essential witnesses to his case to disappear from the scene ; and (3) that after the accident, and for a period beyond six weeks thereafter, the master may be providing for the man and his family, and finding employment for him in a partially disabled state, in a way which he would never dream of doing had he understood that the question of compensation for injury received was to be one which was to be decided by a Court of Law.

Let me take these different points in their order. (1) I have had a pretty considerable experience of actions brought under the Employers' Liability Act, but I have never yet come across a wholly trumped-up claim, in the sense that it was a claim for which there was no foundation, on account of no personal injury having been received by the pursuer. I believe that, were such a thing possible, our Scotch criminal law would be amply sufficient to put down such an abuse. It is not an unknown thing in our Scotch criminal practice to indict a man for a false and fictitious action. I do not know about the law of England as to this matter, but to give such an action any chance of success in that country, there would require to be a conspiracy fortified by subornation of perjury, and assuredly out of such facts a criminal charge would be maintainable; but to meet possible abuse, if it be thought necessary, let a clause be inserted in an amending Act making a false and fictitious claim of this kind punishable by a severe sentence of imprison-

ment. Such a clause as this, I do not think there can be a doubt, would obviate any possible risk of danger to the employer on this head.

(2) As to risk to the master through his losing sight of material witnesses by notice not being made essential within six weeks a little consideration will, I think, serve to show that such an objection is more apparent than real. The action at present has to be brought within six months of the date of the accident, if the injury complained of does not lead to fatal results. That provision, with a certain exception to be afterwards referred to, I am prepared to endorse. What, therefore, does this objection mean? It implies, I presume, that a master may lose material witnesses in his defence between six weeks after the accident and six months. That, of course, is possible, but in the case of death, as the law stands, the want of notice is no bar to the action, if the Judge who tries the case be of opinion that there was reasonable excuse for want of notice. If the law be amended as proposed, in the case of injury also notice may be dispensed with if the Judge be of opinion that there was reasonable excuse for not giving it. At common law there is no law either in England or Scotland as to notice at all, and in very few actions brought before me, and my experience will be corroborated by all those Sheriffs in Scotland who have had similar cases, are conclusions under the Employers' Liability Act not made alternatively at common law.

To what then do these facts point? I think they point to this, that in all cases of accidents in their works, all prudent masters when accidents take place should make immediate inquiry into the cause of

accident, and should take steps to secure the attendance of such witnesses as they think may be necessary or advisable, so that they may be adduced in their favour if the case comes to trial. If in the case of death notice is not imperative, and the rules of common law do not require notice, does it make such a material difference in connection with the precautions to be taken for the attendance of witnesses as to alter the case substantially with regard to the much smaller proportion of cases where the Employers' Liability Act alone infers liability? I think I have said enough to show that the objection is more apparent than real. As matter of public policy it is desirable that masters should make immediate inquiry into accidents when they occur, and I can hardly believe that substantial miscarriage of justice would occur through material witnesses being lost sight of if masters were to take due care, in the knowledge of accidents that have occurred in their works, when such witnesses leave their service, to know as to their whereabouts. It is prudent that they should do so in all cases where they are material witnesses to an accident, because in the ordinary case the master cannot know whether, if he is liable, his liability is at common law or under the statute; and even if the action is under the statute notice may be dispensed with if there has been a fatal result.

(3) I think there is something in this objection, at the same time I do not think it is a very strong one. As we have seen, the possibility of liability being established under the Employers' Liability Act is one which the master in the ordinary case can hardly estimate. His liability may be liability at common

law, but from the workman's point of view the master's proffered sympathy during the first six weeks after the accident may be a mere *ruse* to prevent the workman attempting to obtain his legal rights under the Act. There was evidence to this effect led before the Committee. Thus in the evidence of Mr. Shaen there is the following passage:—"I have been told—I have not known of these cases in my own practice—but I have been told (he afterwards gives us as his informants secretaries of different societies) of many cases in which, upon the happening of an accident, an immediate friendly communication is opened with the injured man, and that friendly communication is kept on for the six weeks; no notice therefore is given, and the moment the six weeks is past, and therefore the the right of action is gone, the friendly communication drops, and the man is without any remedy." That, however, is hearsay evidence, but in corroboration of this statement let me give an extract from the evidence of Mr. Shipton, representing the men in the building trade, and the secretary among other societies of the National Trades' Union Congress. He said:—"We had a case in my own society, where a man was seriously injured by being instructed to work over a heavy lift." (Mr. Shipton then gave some details to show that it was probably a case where there would have been liability under the Act, and proceeded)—"The employer gave him thirty shillings a-week for about two months, in the meantime promised him in a kindly sort of way that he hoped to do something for him, and if he did not get round again he would make some other provision for him. The man foolishly, against the advice of our society, allowed the six weeks to elapse during



which notice should have been given of an action. The result was that the moment the man, finding he could not work, wanted some settlement, the employer said to him—"I have been very kind to you, and since you have shown this spirit of raising objections, I shall pay you no more.'" Then Mr. Shipton being asked, "Is that an isolated instance"? replied, "By no means; I have several instances in our minute book where that has occurred."

Then again, Mr. Ruegg says:—"With regard to the notice being given in six weeks, I know from cases that have come under my notice that it is not at all an unusual thing for the employer to pay the workman, or the wife, if he is in the hospital, his wages for six weeks, and when the time for giving the notice is gone, to say he can do nothing more for them. That has been done in several cases I know of, the idea being that while the family is receiving full wages from the employer they will hardly like to send in the legal notice."

Now it seems to me that the possibility of masters practising this ruse far out-weighs in gravity the weight of the objection which I am considering to the abolition of notice. Would any real objection on this head not be met by a clause to the effect that any sums given by a master, prior to the raising of an action, should be deducted from any sum to be awarded by way of compensation? I am not, indeed, prepared to say that even without such suggested clause the amount of such charity cannot be taken into consideration in an award of damages, if liability thereafter be established.

There seems to be a general consensus of opinion

among the lawyers examined before the Committee of the desirability of doing away with notice altogether. Messrs. Ruegg, Lees, Shaughnessy, Jones, M.P., and Shaen all concur in this view. I have already quoted one passage from Mr. Shaen's opinion, but he puts in such a clear way what have come to be my views as to the desirability of repealing entirely the provision as to notice that I venture to quote a passage of some length from his evidence:—

“I have come to a very distinct opinion upon that—that the notice ought to be repealed altogether. . . . I will just refer to what seems to me to be the great objections. The notice is a kind of addition to the pleading. Wherever an action has to be preceded by a formal notice it is, in fact, an additional pleading required before the case is ripe for hearing in Court; and every addition of this kind is, in itself, objectionable, unless there is some necessity for it. It is particularly objectionable when the necessity is placed upon poor and ignorant people, and often very uneducated people. The workmen very often cannot write, and they are obliged to give this notice. Then one thing that has been said in favour of the notice is that it tends to make the employer inquire into the facts of an accident. I would submit to the Committee that it works exactly the reverse way; and that if the employer can shelter himself from his liability by the plea that he has had no notice, there is a direct motive to him to make no inquiry until he has received the notice. Now I should submit that upon all the grounds of public policy it is of the utmost importance that every motive should be brought to bear upon every employer to make the most careful

and immediate inquiry into every accident that happens. The requirement of notice seems to me, therefore, to be contrary in that way to public policy."

Mr. L. A. A. Jones, M.P., already referred to, in large practice as a barrister, and with very considerable experience in Employers' Liability cases, although I believe more frequently retained for the employers than the employed, is equally clear as to the desirability of entirely sweeping away the requirement of notice. Mr. Shaen, it may be argued, was speaking from the workmen's point of view, but I do not think that this can be predicated either of Mr. Jones' or Mr. Ruegg's evidence. Mr. Jones said:—"I see no adequate reason for retaining notice. I do not see that there is anything in the position of employer and workman which renders it expedient that notice should be given. I have known in my own experience many cases in which great hardship has been inflicted owing to retaining this notice. Of course it is obvious that among illiterate people, where the injury has been of a very serious character, opportunities for giving notice are very often denied, at any rate not availed of by the people; and it is also obvious, where the accident happens in the works of the employer where he has a number of workmen and a number of persons exercising superintendence, he has the most ample facilities for acquiring information as to the accident without having a formal notice of this kind." Later on he says:—"I think on the whole that I have had more cases on behalf of the employers than the employed."

Mr. Ruegg also says:—"I would dispense with the notice altogether. I see no reason for notice, and I see no hardship on the employer from want of notice, but I

do know of cases of very considerable hardship to the workmen from the absence of notice."

The only Scotch legal witnesses examined were Mr. Sheriff Lees and Mr. Shaughnessy. The former, though with some hesitation, rather inclined to the entire abolition of notice, but thought that if it were retained verbal notice should be sufficient. The latter was of opinion that no notice at all should be required.

If, however, Parliament should hold that notice should be retained, the resolution of the Committee should certainly, I think, be adopted. I am distinctly of opinion that if notice is to be retained, the notice should be a written one. There is no difficulty in the usual case, if written notice has been given, in proving that this has been done, but if verbal notice were to be permitted, I can see that in many cases there would be great difficulty as to proof. This question, if the law were changed, would lead to very considerable confusion. There would perhaps need to be a proof in the first instance as to whether notice had been given, and in many cases there would be conflict of evidence on this point. I am clear, for reasons referred to above, that the Judge should have power to dispense with notice altogether, where able to find that there was reasonable excuse owing to the nature of the accident, the master's conduct after the accident, or otherwise, for its not having been given.

There is one point to which I would like to allude. The Act in force makes no provision as to what parties shall have power to send a notice on behalf of the injured workman. Messrs. Roberts and Wallace, as we have seen, take the view that any person may send such notice. This is a liberal construction of the provision,

but it is one which seems to me to admit of argument. No doubt the injured man or his agent may send such a notice, and the sending of such a notice by a near relative has been passed by the Courts without objection. If notice, however, is retained, I am inclined to think that this matter should form subject of distinct enactment. I would suggest a clause to the effect that such notice might be sent by the injured party, by any of his family, by any person authorized by him to send it, or by a fellow-workman. This, I think, would be a wide enough circle for practical purposes. It would not do to restrict the power to the injured man, or person authorized by him, without at least the Judge having the power to dispense with notice on reasonable excuse, because to take the case of an injured workman receiving an injury to his head or other injury, incapacitating him till after the six weeks from giving any directions, he would be debarred from recovering damages.

Something is said in the evidence about an extension of the period of notice to three months; my view is that if notice is not wholly abolished, as I think it should be, the six weeks' limit should be retained.

As to defective notice, the position with regard to this matter is that the Judge is bound at present to hold that a notice is not invalid unless (1) the defendant is prejudiced in his defence by such defect or inaccuracy, and (2) that the defect or inaccuracy was for the purpose of misleading. If notice be retained at all the provision is a liberal one in favour of workmen, and the result of the decisions in connection with this point, as given by Messrs. Roberts and Wallace, goes to show that a liberal interpretation has been given to



this liberal provision—"The effect of the whole matter appears capable of being expressed thus—that any written document which contains a *bona-fide* version of the fact that injury has been sustained, is, if it be duly served, a notice of injury defects, in which may be cured by the proviso." The liberal interpretation to be given to the words "duly served" is further illustrated by the case of *M'Govan v. Tancred, Arrol, & Co.* (13 R. 1033), occurring later than Messrs. Roberts and Wallace's work, where it was held that it was sufficient to prove that a notice of injury had reached the defender. There is one case at least in England where the County Court Judge held that a written notice was such as could not be cured by the proviso quoted above, and it certainly is a question whether the County Court Judge was not by the Employers' Liability Act the sole tribunal by whom this question fell to be determined. In another case in Scotland, the Sheriff-Substitute at Haddington held a written notice invalid, but the Queen's Bench on the one hand, and the Second Division on the other hand, reversed the judgments of the inferior Court, and their judgments must now be held to be law. (*Stone v. Hyde*, 9 Q.B.D. 76; *Thomson v. Robertson*, 12 R. 121.) In these circumstances I do not see any reason for altering the law with regard to defective notice, if the rule that written notice shall be given is retained, while at the same time I deprecate its retention.

The seventh resolution of the Committee is as follows:—*Where a workman is injured, and in the opinion of the Judge who tries the action, or if the action is tried by a jury, in the opinion of the jury, the*

*amount of three years' wages, calculated as directed by section 3 of the principal Act, is an inadequate compensation for the injury in respect of which the action is brought, then upon an express finding to this effect, compensation may be awarded by such Judge or jury to the extent of a sum not exceeding one hundred and fifty pounds.*

Practical experience of the working of the Employers' Liability Act has proved to me the desirability of an amendment of the law in the direction proposed, and this I think I will be able to show in a single sentence. Many children are employed as "half-timers," and paid at a rate not exceeding two shillings or three shillings per week. If such a child be permanently incapacitated through the fault of the foreman, or in some other way for which the masters are responsible under the Act, the whole amount of compensation awardable under the Act, is only some £15 or £20. If there be any class of workpeople for whom it is desirable precautions as to safety should be specially seen to by law it is such children, and nothing like a premium should be held out to those in authority in works to take less care of them than of other servants. The only point in the recommendation of the Committee which I think admits of argument is as to the limit of compensation. £150 capitalized is a small sum for the support of a child hopelessly paralyzed, let us say, through the fault of some person for whom the master is responsible.

The following is the eighth resolution of the Committee:—*Provision should be made, enabling the Judge before whom the case is to be tried, upon good cause shown, to order that the action should be tried before a special jury.*

*In Scotland the parties should have the same rights as to trial by jury as exist in England.*

It seems desirable at the outset of the remarks which I have to make in connection with this resolution of the Committee to refer to the differing practice and procedure of England and Scotland respectively.

As to England the Employers' Liability Act creates no difference as to the power to demand jury trial, and generally as to the procedure with reference thereto, in the ordinary rules as to County Court jury trials. These are regulated by the 9 and 10 Vict. cap. 95. By the seventieth section of this Act, where the amount sued for in the County Court is over £5, either party to the action may demand a jury; under £5 it is discretionary to the Judge to allow or refuse a jury trial. By the seventy-third section of the Act five is directed to be the number of the jury. It is a common practice in England for Employers' Liability cases to be tried by jury.

With regard to the duties of assessors Messrs. Roberts and Wallace say these "will lie in ascertaining the amount of compensation to be awarded to the plaintiff should the Judge determine that he is entitled to succeed in the action. No special qualification is required in the persons who may be assessors under the Act, nor need they apparently be drawn from the assessors' list, but such persons as have expressed their willingness to act may in the Judge's discretion be appointed; and the Judge may himself appoint assessors, though none be applied for, or if there be a short attendance or non-attendance of those appointed." I do not know to what extent the provisions as to assessors have been taken advantage of in English practice, but

as the County Court rules contain elaborate provisions as to their appointment and duties I imagine their appointment is not infrequent.

If neither jury nor assessors are appointed the County Court Judge sits alone, and his judgment as to fact is final, illustrative of which see *Weblin v. Ballard* (17 Q.B.D. 122). Where a jury has given a verdict it is equally the local Judge's province to decide as matter of fact whether the verdict is or is not against the weight of evidence, and against his decision in this matter no appeal will lie.

The power of removing the case from the inferior to the superior Court is discretionary to the superior Court to allow, but as matter of practice it is usual for the English superior Courts to refuse to allow the action to be removed, although they act as Judges of review with reference to the law when a judgment has been obtained. Thus, in the case of *Reg. v. Judges of the City of London Court* (14 Q.B.D. 905), Lord Esher, Master of the Rolls, said:—"If it be said that orders for the removal of actions under the Employers' Liability Act have been often refused, then I would say that I should think the refusal was right, for the statute states clearly that the County Court is the tribunal in which the action is to be tried, and I do not think that such an action should be removed simply because of the amount of damages claimed, unless some difficult question of law is raised." Then in answer to question No. 751 of the Committee's report, Mr. Ruegg said:—"The only ground upon which the Courts at present have allowed cases to be removed to the High Court is that difficult questions of law are likely to arise which cannot be decided in the County Court. In that case they

may grant a writ of *certiorari*, but they have been very loath to do so indeed." In another passage of his evidence Mr. Ruegg says:—"I have tried in many instances to remove a case and have only succeeded once, and that was where the claim was for £1,000. It was thought such an exceptional amount, and after considerable difficulty it was removed." Practically, therefore, the decisions which are reported in English law books with reference to employers' liability cases are appeals as to questions of law in connection with decisions in County Courts.

In England the common law jurisdiction of the County Court Judge is limited to £50, hence if an action be brought there founded both on the Employers' Liability Act and at common law, and if for some reason or other, *e.g.*, want of due notice, the action, so far as founded on the Employers' Liability Act, fails, although the workman may on an average have been earning £70 per annum for the three years previous to the accident, he can only recover £50 if liability at common law is established against the defender.

Now what is the practice in Scotland? The action is necessarily raised in the Sheriff Court, if the action is based to any extent on the provisions of the statute; but as Sheriffs are not in any way limited as to the amount of damages they can award, it is competent to conclude in an action before the Sheriff for damages at common law to any amount, and alternatively to base the action on the provisions of the Employers' Liability Act to the extent of the limit of compensation allowed under the Act. In the ordinary course the case goes to trial before the Sheriff-Substitute, who pronounces a



judgment both on fact and law. This judgment may be appealed to the Sheriff-Principal, who can review it both as to fact and law. It is also, however, competent to either party to appeal the Sheriff-Substitute's judgment direct to either Division of the Court of Session, who have equally a power of review as to fact and law. The judgment of the Court of Session is not final as to law though it is as to fact, and it may still be taken on appeal to the House of Lords. As matter of practice, however, I do not think there has been since the passing of the Employers' Liability Act any action of damages for physical injury received by a workman taken on appeal to the final tribunal.

In the Sheriff Court there can be no jury trial, but as matter of practice it has been no infrequent thing to remove actions of damages at an early stage of the case with the object of trial by jury. The Court of Session have no power to refuse removal because the Act under the third sub-section of section 6, by reference to the Sheriff Courts Act, 1877, confers the power on either a pursuer or defender to remove the action to the Court of Session. The case thus removed is brought before one of the Lords Ordinary for the adjustment of issues, and the case is then tried before such Lord Ordinary with a jury, which under the Court of Session Act, 1868, consists of eight common and four special jurymen. It may be added that should a litigant by accident or otherwise neglect to remove the case at the stage when removal is competent under the Sheriff Court Act of 1877, viz., before or six days after the closing of the record, it can still be removed for jury trial to the Court of Session under the Scotch Judicature Act, 1825, after the Sheriff has made an order for

proof, when the procedure is practically the same as noted above.

When the case is tried before the Sheriff as matter of practice there is no appointment of assessors, because Sheriffs have always been accustomed to sit as assessors in estimating the quantum of damage sustained.

Having thus stated the practice and procedure, I will now note the different points which have been suggested either directly or indirectly to my mind by the resolution of the Committee under discussion—(1) Should there be an extension of the common law jurisdiction of the English County Court Judges to enable them to deal with actions of damages for personal injury where based alternatively at common law and under the statute, so as to put England and Scotland on a similar footing with regard to such actions? (2) Should trial by jury be extended to the Sheriff Court in cases of the kind? (3) Should there be any alteration in the present jury system in England? (4) Should any alteration of the law be made with regard to the rights of removal and appeal in the two countries respectively? These points I will take up and deal with in the order given above.

(1) This question is referred to by several of the witnesses examined. In the preceding pages I have pointed out the superior position which the Scotch workman is in with regard to procedure in a case where it is doubtful whether his best chance of success is at common law or under the statute. He brings his action alternatively, and it is only, as a rule, when the Sheriff-Substitute comes to decide the case on the concluded proof that liability is assigned to common law or to the statute. To a man permanently incapacitated

in the prime of life three years' wages is very inadequate compensation for the damage sustained. Therefore, in cases of serious injury it is eminently desirable for the plaintiff to succeed at common law in the Scotch Courts; but in the English Courts the position is reversed, because the three years' average wages recoverable under the Act by a workman is probably at least three times the amount of the common law limit of £50.

Now, it may be opposed to the theories of English lawyers to confer a higher jurisdiction upon the County Court Judge than that which he already possesses. That is not a matter upon which I am qualified to say anything; but this I would submit with some confidence, that as jurisdiction to the extent of dealing with every Employers' Liability case under the statute has been conferred, it would be no great stretch of the County Court Judge's present power to give him a common law jurisdiction in actions brought before him for personal injury sustained by a workman while in his master's service, and based alternatively at common law and on the statute to the extent in each individual case of the amount of damages he could award under the Employers' Liability Act. Surely if County Court Judges are competent to deal with the one description of case they must necessarily be equally competent to decide the very analogous questions raised at common law. If Sheriff-Substitutes can do so in Scotland, why not County Court Judges in England?

(2) Should trial by jury be extended to the Sheriff Court in cases of the kind? The suggestion as to the extension of jury trial to the Sheriff Court was prominently brought before the Committee by Mr. Sheriff

Lees and Mr. Shaughnessy. With the object of definitely formulating the suggestions made, certain clauses were drawn up by Mr. Lees, and these I have thought it desirable to print in Appendix B. If the suggestions made should be approved, the clauses seem generally well fitted for the object in view. I am, however, entirely opposed to the proposal advocated. I gather from the resolution of the Committee that they are in favour of the proposed extension of trial by jury to the Scotch Sheriff Courts.

In the first place, it may be inquired how the system has worked in England. The present system is condemned. It is suggested that there shall be a discretion to the Court to appoint a special instead of a common jury. Nor is it wonderful, looking at the evidence which was led before the Committee, that this conclusion was arrived at. Thus Mr. Ruegg says, in answer to the question, "How with regard to the jury in the County Court?"—"I have a very strong opinion indeed as to that. I find, appearing for defendants as I generally do, that we have no cause of complaint as to the way in which this Act is interpreted against us by County Court Judges, but we cannot trust to County Court juries. We get five men taken always from the labouring classes; they are common jurymen. I have myself seen men come into the box in the dress evidently of working men for the purpose of trying actions which sometimes involve very large claims between master and workman." Further on he says:—"I am not speaking of the juries being unreasonable in amount; but what I say is, that they will not listen to any defence on the part of the master, and I should suggest that either party should

have a right of summoning a special jury. A jury is only composed of five men in the County Court. They (a special jury) are taken from a list of men in a superior position."

The Committee have not adopted Mr. Ruegg's view as to giving a right to demand a special jury to either side, but they propose to give a discretionary power to the Judge to appoint a special jury. Now I should imagine a motion to the Judge for a special jury—*i.e.*, a jury composed of men of higher social position and presumably of greater education and intelligence—would be moved for only by counsel for defendants. The present system of five common jurymen is condemned by the masters. Would there not be a risk of special jurymen being condemned by the men? Will the working of special juries be likely to be satisfactory to the men if the proposed provision be made law and it be left to the discretion of the Judge in the district as to whether he will have a special jury or not? Such a provision will lead in all probability to certain County Court Judges exercising their discretion almost invariably in favour of appointing special juries when others will take the opposite course. I think it is very probable that such a result would lead to a good deal of ill feeling.

In Scotland, so far as I am aware, there has been no complaint either on the part of masters or men that the law has been in the Sheriff Courts strained against one or other. It may be that there is an impression that the Second Division of the Court of Session are disposed to give workmen rather than masters the benefit of any doubt in the decision of an employers' liability case. Therefore, I confess I do not see why



Scotland, in the supposed or suggested interests of workmen, should commence a novel experiment and adopt a system which has not been found to work well in England in the County Courts. Indeed, as I previously indicated, the present power of carrying employers' liability cases to the Court of Session for jury trial has in some cases led to abuse. I believe the institution of local juries might have a tendency to set class against class. The appointment of workmen to decide the case of brother workmen is not fair to the master, and it may be that the appointment of men in an analogous position to masters, if not masters themselves, for such a purpose, would not be a fair tribunal for workmen.

In Scotland in civil trial by jury special juries have been abolished, except in one single case to be afterwards referred to, by sec. 44 of 31 and 32 Vict. cap. 100 (Court of Session Act, 1868). Juries must always consist in civil cases tried there of eight common and four special jurymen. Sheriffs under the Lands Clauses Acts may sit with special juries to try claims arising thereunder, but this in point of practice very seldom happens, as such claims are almost invariably remitted to arbiters. It would certainly be anomalous, so far as Scotland is concerned, if this power were to be given to Sheriffs to hear jury trials under the Employers' Liability Act while wholly denied in all other cases. In England, as we have seen, jury trials can be enforced when the claim exceeds £5, whatever the class of case. Moreover, I presume if the practice was to be introduced into the Scotch Sheriff Courts, the jury would be five in number to assimilate the practice to that of England.

Such a number is wholly unknown in Scotland. Apart from the doubts indicated as to the successful working of such a scheme on other grounds, it would be an experiment with reference to the constitution of the jury. It is surely inadvisable in connection with such an extensive class of cases to attempt experiments when the present system of procedure is on the whole working smoothly and well.

(3) Should there be any alteration in the present jury system in England? In considering the previous question I have so far overlapped this one. I think it is clear that the present system of five common jurymen trying a case under the Employers' Liability Act has been pretty well proved by practice to be wrong. I doubt exceedingly, for the reasons referred to above, whether a discretionary power to appoint special juries would work satisfactorily. The Scotch system works satisfactorily enough so far as the procedure in the Sheriff Court is concerned. I confess my inclination would be to do away with jury trials in the County Courts altogether. So far as I can see from the reported cases, the decisions of the County Court Judges when sitting alone have been well and carefully considered, and I do not believe that there is any risk of the law being strained against the men at all events.

(4) Should any alteration of the law be made with regard to the right of removal and appeal? It is to be observed that removal and appeal are distinct and separate questions. The English Superior Courts, as we have seen, although having a discretionary power to remove, have resolutely, almost invariably, refused to do so. Removal means taking the case away from the lower to the higher tribunal before judgment has

been given. On the other hand, in Scotland the power of removal has been exercised solely with the object of jury trial, and I think I am right in saying that in no case has this been done at the instance of a defender. But as matter of right, either pursuer or defender can remove the case to the Court of Session, and the superior Court has no discretionary power to refuse. It may, in the first place, be asked, if the English Courts have the discretionary power of refusal, why the Scotch Court should not also have the same discretionary power?

Although, however, I hardly think that any substantial grievance can have been felt in England by the workmen through the power of removal, there is no doubt that the representatives of the workmen have taken up an adverse position to this power being permitted to the Court. A reference to Mr. O'Connor's and Mr. Burt's Bills respectively (pp. 333-4), will show that in both of these a provision is inserted to limit this power. By the sixth section of Mr. O'Connor's Bill it is proposed that "an action shall not, except by consent, be removed into a superior Court under the sixth section of the principal Act, unless the amount claimed shall exceed the sum of £200." The principal Act, of course, means the existing Employers' Liability Act. In Mr. Burt's Bill, section 3, there is a similar provision, with this variation, that the sum named is £100 instead of £200. I presume that in the great majority of actions where the action is founded on the Employers' Liability Act, the amount of damages for physical injury would not exceed £200, and even in cases where fatal injury has been sustained the amount to

be decerned for would seldom exceed the amount specified, because as the limit is the aggregate amount of three years' average wages, £200 represents a wage of about 26s. per week, which is a high wage for ordinary workmen.

While, however, in England the feeling on the part of the men, or those representing them, is to make the local Court practically the tribunal for decision, in the first instance at all events, I should say that in Scotland the wish to retain the decision of the local Courts without power of removal would be that of the masters and not of the men, because, as we have seen, the threats of jury trial and jury trial have been in some cases used in a most oppressive way, and undoubtedly in certain instances for the purpose of extortion. I confess that I am very distinctly of opinion that such a provision as that in Mr. O'Connor's Bill would be a wise and just provision.

Passing from the subject of removal, let us now consider somewhat attentively the question of appeal. We have seen that in England the County Court Judge is final as to fact. In Scotland, on the other hand, the Sheriff-Substitute's judgment as to fact is appealable to the Sheriff, and the Sheriff's judgment as to fact is appealable to either Division of the Court of Session. Why should there be any difference between the laws of England and Scotland in regard to this matter? It not infrequently happens that the Sheriff's view as to fact is rejected by the Court of Session, and that of the Sheriff-Substitute reverted to. Again, the Sheriff-Substitute is the Judge who has the opportunity of seeing the witnesses, and the way generally in which they give their evidence.

Their demeanour is a point of extreme importance in judging of the credibility to be attached to the evidence given. No doubt in many cases under the Act the findings in fact would be conclusive as to the judgment to be given in point of law. It surely will be conceded that it is desirable that actions under the Employers' Liability Act should as matter of public policy, and in the interest of masters, regarded in the aggregate, as well as of the men, be decided as expeditiously as possible. Nor do I think I am unduly exaggerating the estimate of public opinion with regard to the body to which I myself belong, when I say that the judgments of the Sheriff-Substitutes of Scotland in weighing evidence led before them is a high one on the part not only of workmen but of employers. At all events, weighing advantages and disadvantages, I submit that it would be best for both masters and men that the judgment of the Sheriff-Substitute as to fact should be final.

Let us for a moment glance at the length of time which under the present system may be taken in the disposal of a case under the Employers' Liability Act, *e.g.*, in the Sheriff Court of Lanarkshire. The introduction of shorthand in the Sheriff Court has made an enormous difference in the rapidity with which a decision can be got. I am not, I think, going beyond the fact, when I say that by the old system in force a judgment in an employers' liability case before the Sheriff-Substitute, if the case went to proof, could not be obtained under a year in Glasgow at all events, and such cases almost invariably go to proof unless settled out of Court. Nor would it have been heard by the Sheriff-Principal on appeal before in all pro-



bability another year; then, if appealed to the Court of Session, it would not have been expected to have been taken up under six months. Everyone will, I think, agree that it would be monstrous to keep an incapacitated working-man for such a length of time without a final decision on his claim. Things no doubt are much better now, but I will shortly come to consider whether without any substantial injustice delay in decision could not still, to a very material extent, be obviated.

By the present practice, I think I am right in saying that in the vast majority of cases—in all of them, indeed, except a very small percentage—the Sheriff-Substitute issues a final interlocutor deciding the case on proof led before him within three months from the date of issuing the summons. If my preceding suggestion as to assimilating the practice of Scotland to that of England, and making the decision of the Judge of first instance final as to matters of fact, were to be adopted, in the majority of decisions, I imagine, the Sheriff-Substitute's judgment would be acquiesced in, because appeal would be hopeless. After, however, the Sheriff-Substitute's decision has been given, which we will assume has taken three months to arrive at from the date of the initiation of the action, either side has fourteen days to consider as to whether an appeal should be taken. At the end of that period the successful party may extract the judgment which makes it final, but if not extracted it may still be appealed to the Sheriff within a month, or to the Court of Session within six months. Assuming, however, there has been a fortnight's delay in the matter of appeal, it is not possible, owing to the

Sheriff-Principal's heavy roll, that the case can be taken up and disposed of under six months. If the Sheriff-Principal's judgment again be appealed, which may be done before a lapse of fourteen days, or till six months thereafter if not extracted, it cannot be calculated that a decision will be given under six months in the Court of Session. Thus, at present, there may be a delay of sixteen months before the workman gets a final decision. Even then the case might be appealed to the House of Lords, but this I think may be put out of sight, because, as we have already seen, this as matter of practice is never done.

Now, what I venture to propose to obviate that delay, which must be universally admitted to be undesirable in cases of the kind, is this: that whether the Sheriff-Substitute's judgment be made final as to matters of fact or not, that only one appeal shall be allowed at the instance of either party. If judgment be given against the pursuer, if he appeals to the Sheriff, and the Sheriff adheres to the interlocutor, the judgment shall be final. If the Substitute's judgment be in favour of pursuer and the defender appeals to the Sheriff, who adheres, that judgment shall be also final. If, however, the Sheriff reverses the Substitute then an appeal shall be competent to the Court of Session. If the unsuccessful party before the Sheriff-Substitute elects to do so (as indeed is not infrequent at the present time), let him appeal direct to the Court of Session, and let the judgment of the Court of Session be final in all cases, unless special leave be given to appeal to the House of Lords upon the grounds that the question involved is one of diffi-

culty and of great public importance. If this suggestion were adopted I take it that in a very small percentage of the cases would judgment not be given within nine months from the date of the initiation of the action. No doubt in counties other than Lanarkshire, where the pressure of business is not so great, there may be less delay, but Lanarkshire is the county in which, so far as Scotland is concerned, the more important and greater number of employers' liability cases arise.

The ninth resolution of the Committee is thus expressed :—*The term "workman" shall include, besides the persons included in the definition in the eighth section of the principal Act, seamen, and all persons, including omnibus and tramway servants, who have entered into or worked under a contract of service made with the employer, either verbal or in writing, and whether the work be performed in the employer's workshop, or elsewhere, and whether involving manual labour or not. The benefits of the Act should be extended to seamen in cases of accidents arising in home ports. As regards accidents occurring elsewhere than in home ports, the operations of the Act should be limited to those arising from defective equipment.*

The main question dealt with under this resolution is the proposed application of the Act to seamen; the resolution contemplates the extension of the Act to seamen, but proposes a certain limit to the liability established under the existing Act in the case of other employments. Before, however, proceeding to deal with this question it may be as well to dispose of the minor alterations contemplated by the Committee. In

the first place, in consequence of the English decision of *Morgan v. The London General Omnibus Company* (12 Q.B.D. 201), where it was held that an omnibus conductor was not a person entitled to the benefits of the Act, there is an express inclusion in the resolution of this category of servants. In Scotland, as we have seen, a different decision was arrived at; but I take it that there can be no doubt that there is no valid reason for excepting this useful class of servants from the beneficial operations of the statute, and I presume that no question will be raised either in Parliament or elsewhere as to the suggestion.

The words "and whether involving manual labour or not" it is also proposed should be repealed. It was pointed out previously, p. 139, that the term labourer would not include a carpenter, bailiff, or clerk of a parish, nor a person employed as a caretaker or watchman, with no active duties. The proposed amendment will sweep away all the class of cases connected with the consideration of whether the servant had manual duties or not. In the general case there cannot, I think, be a doubt that it is advisable that the operation of the statute should apply generally to all employers of labour and those employed by them. But if the words of the resolution were to become law it might be argued that the Act applied to domestic or menial servants, as to whom see pp. 138, 139. By the tenth section of the Employers and Workmen Act, 1875, "*the expression 'workman' does not include a domestic or menial servant, but save as aforesaid,*" etc., the Act then goes on to define the different classes of workpeople falling under the definition. There is some suggestion in the evidence pointing to the

inclusion of domestic or menial servants in the amending Act, but I do not suppose the Committee seriously entertained the idea of making the master responsible to the housemaid for the fault of butler or cook. Such a result seems absurd; and I do not think it would be advisable to make any alteration in the common law with reference to liability of an employer for accidents occurring to domestic or menial servants.

A very large amount of evidence was led before the Committee, *pro* and *con*, with regard to the proposed application of the amending Act to seamen. There has been, it appears from the evidence, considerable agitation among seamen themselves in favour of the extension of the Act. I do not propose minutely to analyze the evidence. It will be sufficient for my purpose to refer generally to the lines of argument advanced on either side.

One of the witnesses examined was Mr. Callaghan, secretary of the Liverpool Seamen's Protection Society. He stated that there was a general belief among seamen that there was loss of life and limb through the negligence of shipowners, and that that was chiefly attributable to insufficiently manned ships and defective gear and machinery. It was further, he said, believed that the extension of the Act to seamen would lead to greater care being taken by the masters in the fitting out of the ship and to greater efficiency on the part of the officers. He gave instances of accidents which had occurred through defective gearing and in which it was apparently imagined that there was no liability at common law. Mr. Lind, the secretary of the Amalgamated British Seamen's Protection Society, including a



membership of 4,000, was also examined as a representative of the men. He spoke of a great number of meetings of the men of his society unanimously in favour of the extension of the Act. He referred to an accident having arisen from rotten ropes, as to which, after taking legal advice, it was understood and acted upon that the masters were not liable at common law. He further said:—"I know of a great many cases (of injury through defective gearing) if the Committee would like to hear them. I have known men lose three or four fingers. I know of a case of a ship a few weeks ago where a man was entirely crippled for life through the barrel of the winch giving way through faulty casting, where the fault had been pointed out to the officers and they had taken no notice of it." Being asked to what extent he would make shipowners liable, he explained, "Only to the extent that employers are liable on shore, and no more, through defective gearing and improper navigation." He explained improper navigation to mean not mere errors in navigation, but improper navigation through gross carelessness.

I may here, however, explain in passing that it seems to me very doubtful, whatever may be English law, whether certain of the cases referred to by those witnesses in which accidents had occurred through defective gearing would not in Scotland have been construed as inferring liability against the master (see the case of *Hutcheson v. Rothwell*, 13 R. 463, and referred to at pp. 104 to 106).

Mr. Wilson, the president of the North of England Seamen and Seagoing Firemen Friendly Association, gave evidence as representing seamen. He also spoke

to numerous meetings held by the men in connection with his association. *Inter alia* he said:—"We have had about thirty or forty meetings in the North attended by not less at a time than 300 or 400, and a resolution in favour of the Act has always been carried unanimously; but last week, I believe, there was a meeting held which was attended by fifteen men, and these fifteen men passed a resolution against the extension of employers' liability." This witness emphatically said that the object of the men in wishing to extend the Act was to prevent accidents and not to make money. "The seamen do not require the ship-owners' money, what we require is more security for life and limb at sea." He also referred to numerous cases where accidents had happened through defective gearing, but for which no remedy at common law appeared to be maintainable. In answer to another question he said:—"We simply ask that if we can prove that a man has been killed or maimed through negligence on the part of officers or owner he ought to receive compensation for the same." As to negligence, it was explained that where an accident could be proved to have happened through undermanning, that this should be held to constitute negligence.

Mr. Fitzpatrick, the secretary of the Bristol Channel Ports Seamen's Defence Association, spoke to the unanimous feeling of the men in favour of the extension of the Act. He referred to an accident caused, as he said, by gross fault on the part of the chief engineer of a large vessel, where seven men were killed, and to other accidents. The accident in question happened by the chief engineer doing something which was probably with the object of increasing speed, and it was

suggested that this might have been done on account of money inducement being held out to captains and engineers to make rapid passages. In such a case, no doubt, unless it was capable of proof that the engineer acted with the sanction of the owners, as the law stands there would be no liability.

Perhaps, however, the most important witness as representing the seamen's side of the question was Mr. J. S. Lemon, who held a chief officer's certificate from the Board of Trade, and had been a seaman almost all his life, although for seven years previous to his examination he stated he had not been at sea. He is the president of the Amalgamated British Seamen Protection Society. The chief points to which he spoke were as follows:—

(1) As to his having been present at scores of meetings of seamen where resolutions had been passed in favour of the extension of the Act to their occupation. In answer to the question as to why the extension was wished, he replied:—"In the first place, I believe that if the owners felt they were compelled to take greater care and precaution against preventable accidents happening we should have fewer of those accidents, so far it would effect owners, and the men would have greater security. The opinion as has been expressed by the men themselves, so far as I can gather, is that they can see no reason why they should have been left out in the cold. . . . I believe they were excluded simply because they had no direct representative in the House of Commons."

(2) One of the objections stated by the owners' representatives is that the extension of the Act would lead to the employment of foreign seamen. Mr.

Lemon is of a different opinion, but this point will be taken up later on.

(3) Mr. Lemon then gives numerous illustrations of defects in gearing which are apt to lead to accidents, and which have in his experience led to numerous accidents.

(4) He spoke of the difficulty of successful prosecution for neglect under the existing law, and refers to inspection by the Board of Trade as being very seldom made. "There is no inspection provided for in ordinary vessels. If we point out any glaring deficiency in a vessel's equipment or rig to the Board of Trade officials, they will inquire into it, and possibly have it mended; but we have no authority to do that; we have no means of going on board ship to find out those things. And, indeed, if extending the Employers' Liability Act to seamen, it is made the owner's interest to see that these small details were looked into, that would obviate the necessity of any of us going down to inquire into things which we are told do not concern us." I may here note, as afterwards referred to by Mr. Beazley, Board of Trade inspections prior to sailing are made in the general case only if ships are carrying passengers.

(5) Asked if there could be any difference of opinion as to what should be the complete outfit of a ship for the safety of life, the reply was:—"No; what I have been quoting is founded upon the ordinary precautions which are taken in well-conditioned and well-found ships. The bulk of the ships which leave the port of London are fitted with everything which I have spoken of here, and have all the proper precautions, but there are some in which, either on the

score of economy or from negligence, these little items are overlooked ; but inasmuch as they are fraught with such dreadful consequences to seamen themselves, I believe they should be insisted upon."

(6) Asked if it was proved to him that there would be liability under the existing law through the owners failing to provide effective gearing, if it would make any difference in his opinion as to the desirability of extending the Act to seamen in this matter, the witness replied:—"No; I can give you a reason for that. If an accident happens on board a vessel through the breaking of a tie, and the owner says he has done everything in his power to prevent it, the onus of proof would lie upon the man. If he recovered and got back to his own country after lying for some time in a hospital in foreign parts, when the crew and all the witnesses that he could get together would be scattered perhaps in all parts of the globe by the time the man arrived here, and if as you say there is a tribunal in existence at the present time, it is like the dodo bird, it may be talked of but never seen. . . . A more ample measure, such as the extension of the Employers' Liability Act, would in the case of negligence on the part of the owner give something approximating to justice to the men; and I think under those circumstances preventable accidents would be of less frequent occurrence. . . . I have read the Act sufficiently to know that it would be a shorter and easier way of getting justice done than anything which exists at the present time, and believing that it would be a boon to seamen, I am here to-day to try and induce the Committee to see it from the same standpoint I see it from."



(7) Mr. Lemon went the length of advocating that the owner should be liable for the captain's negligence or errors in navigation. In answer to the question, "If an owner employs men of good character with certificates of competency obtained after examination from the Board of Trade, and through default or neglect on their part at sea lives or limbs are in danger, would you consider that the owner ought to be made liable for their act or neglect?" the reply was, "Yes, by the same reason as I arrive at the conclusion that a man who owns a steam-mill ashore is responsible for the man in charge of that mill." Asked farther on, "If a ship was lost through a master not having taken as many casts with the lead as was thought desirable, would he make the owner responsible?" Mr. Lemon replied, "That was an error in navigation for which the Board of Trade would be responsible. The score of economy, again, often actuates an owner as to the kind of man who commands his vessel. I think under the circumstances I would still hold him responsible." The witness admitted that the Board of Trade examination was sufficient to secure competency, and then the question is put, "Then the owner having got that competent man, and he not having taken sufficient casts, is the owner responsible?" to which the witness replied, "The competent man requires to be a moral man as well as a competent man, and there are many men who culpably neglect their duty. . . . The owners, provided it suits their plans, and can see the way to get a profit, do not inquire into the moral character or integrity of the man to whom they entrust their property. I believe that, if you held the owner responsible, he

would take more care in the selection of his masters and officers, and would therefore be induced to give a higher remuneration, so as to secure the best kind of men." Farther on the witness says that he would make the owner responsible for all the risks at sea in navigation, except the act of God, fire, and the Queen's enemies, and responsible for the acts of all on board the ship, inclusive of certificated officers.

I have taken these witnesses as representatives of seamen, and I do not propose to advert to further evidence of this description. The evidence of these witnesses sufficiently indicates the ground of complaint which seamen generally have to their not being included in the operation of the Employers' Liability Act. Their argument is, "The large class of labour which we represent should have the same protection in the way of greater security to life and limb which is afforded to men on shore."

Before dealing with the evidence of shipowners let us for a moment turn to the evidence of the only legal witness who expresses any opinion with regard to the proposal to include seamen in the operations of the amending Act. Mr. Ruegg, in answer to the question, "Have you any observations to offer with regard to seamen?" replied, "Only this, that I cannot see any reason in principle why they should be excluded; on the other hand I can see great practical difficulty in the case of an accident happening abroad, or when the ship is out of England, with regard to the limitation as to the time in giving notice; but of course that could be got over, and the limitation as to the time of bringing the action." Then in answer to the question, "The Act does not apply to seamen?" he stated, "By

a somewhat complicated construction of the word 'workman,' the Act does not apply to seamen. Whether seamen were intentionally excluded or not, I do not know, but to exclude seamen you have to construe several Acts of Parliament." Later on in his evidence, in answer to the following question put by Sir Thomas Brassey, the chairman, "Do you see any difficulty in including the seaman, from the nature of his employment, or arising out of the fact that the ship had left her port and is completely out of the control of the shipowner, and do you see any difficulty arising out of the nature of the employment itself, the difficulty, for instance, to the shipowners to see that the gear is always in sound and good condition? Do you think that the perishable nature of rope is a circumstance that should be taken into view as making it difficult to impose a responsibility upon the shipowner such as you might impose, as for instance upon a Dock Company, with regard to claims of that description?" the reply given by Mr. Ruegg was, "I can see no difficulty with regard to absence on the liability of the shipowner to see to the plant, because he has responsible persons there. I can see a difficulty with regard to remedying the defects and so on in the plant and with regard to getting new plant. It may well be that the ropes may perish, or machines may break down, and there is no power of remedying that. I can see a difficulty with regard to that." Later on, again, in answer to a question by Mr. Tomlinson, "Would not there be this difficulty with regard to accidents arising from failure of machinery or plant, that it might frequently happen that in damage through storm a vessel might have to refit abroad, and the machinery procured, or the ropes,

and so on, might be defective from their not being able to procure satisfactory material, would that be a defence to an action?" the reply was, "All the actions are founded on negligence, and there would be no negligence if the employer got the best he could under the circumstances." Then it is suggested that in such a case it would not be the employer but the captain who would be expected to do the best he could, and the answer is, "If they were put to an emergency and did the best they could, there is no negligence. Of course nobody could do more."

As may well be imagined, a very strong feeling is shown on the part of shipowners against the full extent of the proposals made by seamen or their representatives. Mr. Beazley, the managing director of the British Shipowners' Company, Ltd., and a partner of the firm of James Beazley & Son, was examined. These firms own 22,000 tons of steam and 15,000 tons of sailing vessels, and employ some 619 men as seamen in connection therewith. Mr. Beazley is also ex-chairman of the Liverpool Steamship Owners' Association, which association contains members holding altogether 1,000,000 tons of steam tonnage, and employing over 20,000 men as seamen. The points submitted by him I will endeavour to state shortly. He spoke as for the association last named.

In the first place he submitted "That a shipowner's liabilities are already excessive, certainly greater than those of our foreign competitors, which in these days of foreign subsidies and bounties is a fact which should not be lost sight of, we consider." He referred not only to the obligations imposed on shipowners by common law, but also as to the express liabilities

imposed upon them by the fourth and fifth sections of the Merchant Shipping Act, 1876. By the fourth section of that Act, shipowners are under criminal responsibility for sending a ship to sea in an unseaworthy condition, and by the fifth section of the Act owners are responsible to seamen specifically for losses or accidents arising out of unseaworthiness due to negligence; and unseaworthiness, he explained, includes defects in hull, machinery, and equipment, besides overloading and undermanning.

The reason, as previously explained, for seamen desiring the extension of the Act, is on account of greater security to life and limb, and the suggestion is that this special legislation as to seamen already affords that security.

Then some reference is made to defective ropes or gearing, and Mr. Beazley stated that the shipowners would be responsible where an accident happened through the shipowner having supplied bad tackle or inferior equipment; but he explained that had a rope become worn out in service and had still been supplied by the officer in command, and an accident had happened in consequence of this defective rope, there would be no liability, because the accident would then have come about through the fault of one in common employment. Asked, however, if there would be objections on the part of shipowners to do away with the exception of common employment, provided they were to be free from casualty through negligence in navigation, Mr. Beazley frankly said:—"I do not think they would object, provided they were not made responsible for negligence or error in navigation." Mr. Beazley then went on to explain that it was almost, if not im-



possible to draw any distinction in Courts of law between negligent navigation and errors in navigation, although these might be held to be errors of judgment. I agree with him in this, at all events to this extent, that if the error of judgment was such that no ordinarily prudent captain in the circumstances would have fallen into it, it would amount to negligence. Then a reference is made by him to the careful superintendence by the Board of Trade before ships are allowed to proceed to sea, as also to the certificates as to competency granted by the Board of Trade to captains and officers, without which they cannot act.

In answer to the question, "Are there any other reasons you would like to state why you think a shipowner should not be placed under the liabilities to the full extent proposed by the Bills before Committee?" Mr. Beazley replied, "Yes; there are several reasons. One is the nature of the employment itself, its dangers being from the elements, and its conditions frequently beyond human control. Secondly, the shipowner, unlike the employer of labour on land, cannot be at hand to superintend his servants and to replace them by others if he finds them incompetent or careless. Thirdly, the accidents and injuries which would give rise to claims would take place at sea; the shipowner would have no independent evidence, and the temptation to perjury and collusion on the part of seamen would be a very great danger to a shipowner. The evidence of the officer, in obeying whose orders the accident might have happened, would be looked upon as prejudiced, whilst the witnesses called on behalf of the injured seaman would almost certainly be his fellows, whose sympathies he could command." With

regard to the second of these points Mr. Beazley explained, "Captains and officers in whom shipowners have the greatest confidence, as I know from my own experience, sometimes suddenly develop habits of drinking on the voyage, when it is impossible to replace them."

Then, again, as to risks in navigation, after explaining as to testings by the Board of Trade of the competency of captains and officers, which testing is a security to the owners of their skill in navigation, Mr. Beazley made the following statement, drawing a comparison between shipowners and railway companies:—"I would say that everything in connection with railway travelling can be carried out with precision. The train runs along fixed tracks, and the drivers and guards have no scientific calculations to make, as officers of ships have, to show them their course, but have signals at short intervals of distance to guide and warn them; but a shipowner and his officers have the dangers of wind and weather, tides and currents, fog, ice and snow, and hidden rocks and shoals to contend with. A small error in navigation, an insufficient allowance for tide or current, or the weather affecting the compasses, may put a ship ashore and cause injuries or loss of life. Such risks and contingencies no employer on shore has to contend with."

In answer to a question as to the nature of the survey by the Board of Trade, Mr. Beazley replied, "The Board of Trade survey all vessels which require passenger certificates; they do not survey ordinary vessels excepting the case of new steamers, to pass their boilers."

Asked as to his opinion of the effect of further

legislation in reference to the relations that exist between owners and seamen, Mr. Beazley said:—"I believe it would foment litigation of a speculative character and would also tend to dry up the sympathies of shipowners towards the seamen. At present when a seaman or officer gets hurt in the execution of his duty his employers generally assist him until he is recovered, whether they are legally responsible or not, and in most cases they are not and would not be even under the Employers' Liability Act. . . . I think it (the extension of the Act) would prejudice the interests of seamen to a great extent. I think shipowners would only pay what they were legally bound to pay if the Act were extended."

Mr. Beazley further said:—"I think another probable effect of extending of the Act to seamen would be that a still further preference would be given to foreign seamen, to the detriment of British sailors, and another inducement would be added to those at present existing to put ships under foreign flags."

Asked why, in his opinion, the effect of the Act would be to lead to the employing of foreign seamen, Mr. Beazley replied, "Because foreign seamen are more sober and more amenable to discipline. A great many accidents take place through the fault of seamen themselves when they are under the influence of drink; and another thing, supposing an accident did happen, I do not think foreigners would be so likely to bring lawsuits against shipowners as British seamen would." Mr. Lemon's contrary opinion may here be given. In answer to the question, "Do you think that foreign seamen would be less likely than English seamen to sue for compensation under the Act?" he replied, "No;

I believe the contrary would be the effect. The foreign seamen would give the most trouble." Mr. Beazley went on to explain that a shipowner at present suffers no disadvantage, but the contrary, by putting his ship under a foreign flag; but the reason for not doing so was sentimental, that a Britisher likes to carry his own flag. In answer, however, to the following question he gave an affirmative answer:—"But you think the sentimental reason will be overcome by the commercial one if the sailor was put under the Employers' Liability Act?" This view is discountenanced by Mr. Lemon, who denies that this would be the result of the extension of the Act.

Mr. Beazley stated that sailors who are personally injured by reason of a defective condition of a vessel have at present the right to a civil action of damages as well as of making the owners liable penally, and then in answer to the question, "Have they to the same extent as those persons who are employed on shore?" Mr. Beazley replied, "Yes; excepting where common employment comes in. If the shipowner can put forward the plea of common employment it throws out the sailor's claim. That is the only difference, I think."

The following are important passages of Mr. Beazley's evidence:—"I should like to explain that shipowners so far as I know are quite willing to bear all responsibilities in regard to matters over which they can themselves exercise control; but we do not want to be saddled with responsibilities where we have no power to control matters." Then, in answer to the question, "Would you be satisfied if the liability of the shipowner under the Act, 1880, was limited to the case of a

vessel in a home port or in home water?" Mr. Beazley replied in the affirmative, after defining the question to mean, "Supposing his responsibility for sending a ship to sea in a seaworthy state be limited to home ports."

Other shipowners examined were Mr. George Smith of Glasgow, of the firm of George Smith & Sons, holding a steam tonnage of 37,000 tons and 15,000 tons of sailing vessels; Mr. Worthington, the chairman of the Liverpool Sailing Shipowners' Association, representing 800,000 tons; Mr. Watts, a member of Watts, Ward & Co., steamship owners, Newcastle, Cardiff, and Newport, having a management of some sixteen steamers, but who appeared on behalf of the Chamber of Commerce of the United Kingdom and for the London Shipowners' Society; and Mr. Pinkney, of the firm of Messrs. W. & P. Pinkney, of Sunderland, steamship owners, owners of some 10,000 tons of steam shipping. Mr. Beazley's evidence may, I think, be taken as fairly representative of the views of shipowners generally. I merely intend to refer to one or two passages in the evidence of these witnesses which have struck me as interesting and important.

Mr. Smith said in the course of his evidence, referring to Mr. Chamberlain's proposals with regard to merchant shipping, "The employers' liability was part of his Bill, and part of that Bill was, 'Provided always that nothing in this section contained shall be construed to impose any liability on any owner of a ship in consequence of any error in the navigation of such ship of any officer of such ship.' I am now asked if I will agree to the whole Act if that was put in this Bill;



what I say is, that the whole body passed that, but the shipowners as individuals in Glasgow would not be satisfied." Then the question is put, "Does it mean this, barring error in navigation you do not object to liability under the Act?" to which the answer is, "That was the agreement that was come to with Mr. Chamberlain when the thing was put forward; but I have been speaking to some other people in Glasgow about it, and they would not be satisfied." Later on he says:—"I understand we are responsible for negligence. If we send a vessel to sea we are responsible if she is sent negligently. We hold that we should not be made responsible for our masters and officers." In a still later passage in his evidence Mr. Smith said:—"I am decidedly of opinion that if you go on farther in that direction you will drive the shipping trade out of the country."

Then Mr. Worthington at the opening of his examination stated:—"Our chief objection is to making us liable for the acts of our captains and officers when they are out of our control. That is the kernel of the case as regards us;" and farther on he stated, as his own individual opinion, he would be willing to waive the defence of common employment, except in the case of errors or negligence in navigation. Later on he explained that he means only to waive the plea of common employment where the person in fault is a chief officer.

Mr. Worthington expressed the opinion that the extension of the Act to seamen would lead to the employment of more foreign seamen.

Mr. Watts expressed the opinion that the owners should be responsible for proved negligence in ports,

and for accidents due to defective tackle, whether happening at sea or not.

Mr. Pinkney, in answer to the question (and after he had expressed the strongest objection to the shipowner being made liable for errors in navigation), "Then, short of placing the shipowner under responsibility for errors and negligence in navigation, would you have any objection to assume similar responsibilities to those on shore?" replied—"Yes; I do not think that the shipowner ought to take upon himself the responsibility of other employers of labour on shore; see the great difference there is between the position of the two!" And then, being asked to explain in what, he replied—"For example, with regard to the owner of a ship, the first thing is (indeed, the law compels him in the first instance) to obtain certificated officers. Each man is supposed by virtue of his examination to be fully competent for the duties for which his certificate is given. But the owner does not take a man because of that certificate only; he makes due inquiry about him. Of course it is a very important thing for an owner to have the best man that he can get according to his judgment, and there is no doubt he always tries to get the very best man he can. That man, probably, when he gets to sea may break down in some way or other; he may fall ill sometimes, or, as suggested, he might take to drink, and there are many things which, after the ship leaves an English port, the owner has no more control over, and therefore in that way he ought to be dealt with differently from an employer of labour on shore. Further than that, the sea and all its relations are so very uncertain that no one can ever tell what is going to happen at sea. If my captain may

not be stupid, another man may have a stupid captain, and by the stupidity of one man a collision may arise. . . . A fog comes on in a few minutes. If you were taking a very fast steamer across the Atlantic, and a fog came on suddenly, almost before you could get the ship eased down to what the law would call going slow, she runs into an iceberg, and perhaps all hands are drowned."

I have I think pretty fairly indicated the lines of argument on both sides. On the part of the large shipowners, at all events, there seems to me to be no obstinate refusal to deny the benefits of the Act to seamen ; but they say that it is only fair, if it is to be extended, this extension should be coupled with certain modifications.

Perhaps I may here quote a well-written article which appeared in the *Scottish Law Review* of April last, written, I believe, by Mr. Sandeman of the *Glasgow Herald*, more especially as in the latter part of it it refers to a project which I think ought to have an important bearing on the subject under discussion, and which I intend to refer to later on. After referring to seamen being excepted from the operations of the Act, the writer goes on :—

" Why was this done ? Simply because it was acknowledged by general consent that seamen and their employers occupy a position which is quite unique. The principle underlying all the measures that have yet been passed in connection with the liability of employers—more particularly the Act of 1880—has been this, that an employer of labour who could exercise supervision over his men should be made to do so. But how is it possible for a shipowner to look after his sailors or his officers either ? For the greater part of the year they pass beyond his control—hundreds, or it may be thousands, of miles away. He can neither change his officers nor prevent mischief happening through their neglect of duty. In land service of any kind the circumstances are entirely different, though Mr. Arthur O'Connor and the supporters of his Bill in the House of

Commons seem slow to admit it. Their argument amounts to this, that seamen are as much entitled to any benefits conferred by the Act as miners or railway servants, or other workmen engaged in equally perilous industries. But they omit to take into consideration one or two circumstances of very great importance. They forget that, while workmen in mines or in buildings, and engineers on railways or public works, carry on their labour almost daily under the eye of their managers or masters, the engineer afloat or the person entrusted with 'superintendence' on board ship is far removed from the owner's glance. If an engineer on shore goes wrong or turns out inefficient, he can be discharged before much harm is done, and his place filled by a more trustworthy hand. But no such course is open to the shipowner. His most responsible and trusted officers may, while far distant, fall into neglect and commit some blunder involving the doom of the vessel and all on board. The advocates of Mr. O'Connor's Bill seem also to forget that in another sense shipowners carry on their industry under different conditions to those of any other employer of labour in the country. They are not free agents. They neither select their own ships, their own officers, nor their own men. They have to submit the plans and specifications of all their vessels to the Board of Trade, and they must build them in accordance with rules with which they may not agree. They have also to load them in a particular manner and to a particular depth. In the choice of his servants the shipowner gets as little of his own way. He can only select masters, mates, and engineers amongst a limited body of men certified by the Board of Trade. From first to last, therefore, he practically acts at the instance of a Government Department. How can it be argued that his lot should be cast, so far as liability is concerned, along with those who enjoy a much greater amount of freedom?

"Shipowners have quite enough responsibility placed upon them under the old statutes without being subjected to anything under the new. If they are themselves negligent, if they commit any personal breach of duty—if they wilfully send overloaded or unseaworthy ships to sea—they have to pay dearly for it. Looking at the case of seamen alone, what is the liability of shipowners? In the first place, if any sailor is injured on board ship the shipowner must supply him with medical attendance and subsistence until he is cured or is brought back to the United Kingdom, and that even if the injury be received without any fault of the officers of the ship. Then, in the second place, the owner has pecuniary liability for loss of life or personal injury to any one on board his own ship or on board any other ship with which his own may be in collision. This liability is restricted when the accident happens without the fault or privity of the owner, but otherwise it is unlimited. In the next place the owner is liable to be proceeded against by the Board of Trade on behalf of the relatives of any seaman killed, for damages amounting at the least to £30. And finally, if loss of life happens through the neglect of the owner to keep his vessel seaworthy, the relatives of seamen lost have themselves the right to sue for the recovery of further penalties. It will be a question for the Select



Committee on Mr. O'Connor's Bill whether all the provisions of the Employers' Liability Act with which shipowners ought fairly to be saddled are not already covered by these obligations. Mr. O'Connor himself has some scruples on the point, for he offered, during the debate on the second reading of his Bill, to accept an amendment exempting shipowners from liability under circumstances 'in which it could be shown that such liability was unreasonable in respect of injuries sustained abroad.' If he only carries this spirit of fairness and candour into the proceedings before the Select Committee, shipowners need have no fear of the result. Shipowners, however, are anxious to solve this problem of their relations with the seamen in a very different form to that proposed by Mr. O'Connor. Even if that gentleman's Bill were passed to-morrow, it would, in all probability, do a great deal more harm than good. The seaman who sustained injuries might be benefited, but it is safe enough to predict that a feeling of the most painful animosity would spring up between employers and employed. The shipowners, anxious to avoid this, have long been meditating the establishment of a seamen's pension and benefit fund—a fund that would be general in its application, that would apply to all ranks of the mercantile marine, and that would embrace alike the old and the disabled. There will, unfortunately, be no means of bringing this scheme directly under the notice of the Select Committee; but it is at present being placed before a more important body, the Royal Commission on Merchant Shipping. The details of the scheme have not yet been made public, but it is understood that the proposal amounts to this, that both seamen and owners should contribute to the fund, that the contributions should be compulsory, and that the fund should be augmented by the proceeds of the effects of deceased seamen and unclaimed wages, as well as fines and forfeitures. Out of the fund would be given temporary relief during disablement, pensions to officers and men permanently disabled or retired, and payments to widows and orphans on the death of their husbands. It is proposed to entrust the management of the fund to a committee of the Merchant Shipping Council, which the Royal Commission will be asked to recommend to be substituted for the Marine Department of the Board of Trade. The arguments by which such a scheme can be supported are clear and cogent. It would form a bond of union between seamen and the merchant service, besides promoting a better feeling between shipowners and their employés. It would attract a better class of boys and men to the service, and so get rid of the necessity of employing so many foreigners in our merchant navy. It would also prevent our sailors from becoming objects of charity or a burden upon the poor-rates; and, last of all, though by no means least, it would dispense with the application in any form to the sea service of the Employers' Liability Act."

Having thus given I think substantially the reasons advanced for and against the extension of the Employers' Liability Act to seamen by the witnesses



examined, before proceeding to discuss the result arrived at by the Committee it may be, perhaps, convenient to sum up the arguments on both sides, with the answers suggested.

*On the part of the seamen—*

We are entitled to the same protection as occupations on shore for the security of life and limb.

*On the part of shipowners it is replied—*

You already have special protection by special legislation against over-loading; against defective equipment, including under-manning; against inefficient officers, by Board of Trade certificates, without which officers cannot act; and further, penal prosecutions could be instituted against owners for various shortcomings, the object of which is intended to ensure safety; besides, our position and that of employers of labour on shore is wholly different.

*On the part of the seamen it is answered—*

We wish the protection afforded by the provisions of the Employers' Liability Act; other legislation does not provide any substantial guarantee for security. If these provisions are given us masters will see (1) that no ship starts without machinery and gearing being carefully examined, and (2) that officers will not be employed, if masters are responsible for them, without a very much more careful scrutiny, not only as to their character for competency, but also as to the possibility of want of care through occasional fits of drunkenness or otherwise.

*On the part of the masters it is rejoined—*

(1) By the present law they are responsible for all negligence in equipment, and (2) that to make them responsible for the faults of officers, mates, and engineers whose competency has been tested by the Board of Trade (*a*) as to errors and negligence in navigation, and (*b*) some of them say as to any other faults, either as to defective gearing, if efficient when it left port, or for any other fault, would be grossly unfair; (*c*) others are willing, errors or negligence in navigation being excepted, to accept liability for negligence of masters, mates, and engineers, but not for those of petty officers.

I have thus endeavoured to epitomize the general result of the evidence led. What I propose now to do is to set forth the conclusions at which the Committee have arrived and to discuss the soundness of the suggestions made.

The Committee propose:—"The benefits of the Act should be extended to seamen in cases of accidents arising in home ports; as regards accidents elsewhere than in home ports, the operations of the Act should be limited to those arising from defective equipment. It will be at once asked, Supposing these resolutions be given effect to, what exactly is the intention of the Committee? The words of the resolution are, I think, ambiguous. It seems desirable to take the two sentences which I have quoted above separately. The first sentence, then, is—"The benefits of the Act should be extended to seamen in cases of accidents arising in home ports."

I understand that here the Committee suppose

that shipowners should be placed precisely in the same position as employers of labour at present subject to the provisions of the Act. That is to say—(1) Shipowners shall be liable for defects in plant or machinery whether the shipowners have originally supplied defective gearing or plant through which an accident has come about, or whether the accident has come about through some defect therein owing to the negligence of the master or some one in charge at the time of unloading; (2) if the accident has come about through some negligent act of superintendence on the part of the master or mate, or some one in charge at the time of loading or unloading; (3) if the injury complained of has happened through the injured workman having conformed to some negligent order on the part of someone superior in authority, or having conformed to such order and the injury has come about, not through negligence in the order, but through some other description of negligence on the part of the superior seaman; and (4) through the accident having come about through defective rules or byelaws on the part of the shipowner.

When ships are lying in home ports I think it will be conceded that no logical reason can dissociate employment therein from any other description of labour. In the evidence of the shipowners referred to above there is practically no such attempt. The main distinction attempted to be drawn on the part of shipowners between themselves and other employers of labour is—"The latter have in their own hands the control of their own establishments; we have not when our ships are at sea." This argument, it will be observed, does not apply where ships

are lying in home ports. It is quite true that the effect of such a provision being passed as that suggested above might lead to an immediate inspection of the equipment of ships, and an immediate inquiry into the efficiency of the masters and superior officers whenever they arrived at a home port ; but I do not myself see any valid argument which can be suggested against the greater security to life and limb which would thereby be afforded to seamen, and I am bound to say that no reason is suggested by the principal shipowners examined in connection with this matter unless the very general one that it is not advisable in the interests of the shipping trade to add any further burdens thereto from the fear that it may lead to the manning of ships by foreign seamen and to shipowners enrolling themselves under a foreign flag.

The second part of the resolution of the Committee as to seamen is in these terms :—" As regards accidents occurring elsewhere than in home ports, the operations of the Act shall be limited to those arising from defective equipment." This paragraph, as I have already indicated, seems to me ambiguous. Does it mean that the owner shall be responsible for accidents occurring through some defects in the gearing, and what are understood to be comprehended in the word "equipment," when the ship leaves the home port, or is it also intended that it shall apply to accidents occurring through these if defective at the time of the accident. The two things, it is to be observed, are totally distinct, and evidence at considerable length was led with regard to both points. Some of the larger shipowners, as we have seen, were willing, if error or negligence in navigation were excepted from liability under the Act, to

concede the extension of the Act to defects in gearing which had brought about the accident, whether the fault therein could be said to be attributable to the owners themselves or the fault of persons in their employment subsequent to the ship having started from the home port; but, on the other hand, no doubt it was contended strongly by certain of the witnesses examined that it would be unfair to extend such a liability to shipowners. Let me illustrate my meaning by an example. Supposing the ship when it started was well and sufficiently equipped, but owing to stress of weather the gearing had sustained certain injuries. Let us further suppose that the captain had ample means for putting what had gone wrong right, but failed to do so, and in consequence of this not having been done an accident had happened through some defective gearing. In these circumstances it would be arguable that there was no fault on the part of the owner with reference to the equipment; that the fair meaning of equipment was the fitting out of the ship at the home port, and that for an injury so occasioned there could be no liability on the part of the owner. On the other hand, supposing the resolution as it stands were to pass into law it would be argued by the men that the word equipment had reference to the state of matters at the time of the accident, and that, no matter by whose fault it was defective, it was through defective equipment that the accident happened.

Passing from this point in the meantime, let us for a moment consider the length to which certain advocates of the seamen are prepared to push the argument. It is contended by them that no matter whether a ship is lost by an error in point of navigation on the part



of a captain, and whether he is placed in difficult circumstances for judging as to which of several courses he should take, or whether he has been guilty of what may be called reckless navigation or not, if his conduct has been such as to bring about injury or death to many or any of the crew shipowners are to be responsible. I believe that if such a sweeping change in law was made the effect might very probably be dangerous to our commercial prosperity. I do not doubt that to a large extent it would have the effect of inducing shipowners to place their ships under a foreign flag. Whether it would have the effect of replacing our sailors by foreign seamen I do not know. A different opinion, as we have seen, was expressed as to whether British or foreign seamen would be more troublesome in connection with questions arising out of the extended Act, and I cannot say that this appears to be an argument of any great weight; but I do not think that it can be questioned that if British owners were to be made responsible for errors in navigation it would lead to a large extent to a change of the nationality of our ships. It seems to me that this alone would be a disadvantage which would more than counterbalance any advantages to be reaped by making shipowners responsible for errors in navigation.

But apart from this it would be unjust. I agree that mere technical competency in the fact of a captain holding a Board of Trade certificate should not *per se* protect a shipowner if he employs a captain without making inquiry into his individual character. If, for instance, the shipowner were to employ a captain with regard to whom any inquiry would have shown that he was addicted to intemperance, and through whose inca-

capacity in consequence a ship was lost, I do not say that the former should not be responsible. I incline to think that at common law he would be responsible for an accident through negligent navigation coming about in this way. If, however, he had used due diligence in inquiring as to the captain's character and qualifications, coupled with the fact of the Board of Trade certificate, it would I think be wholly unfair to saddle the shipowner with responsibility for errors in navigation. Perils of the sea, as pointed out in Mr. Beazley's evidence, are wholly dissimilar from those which occur on land. "A shipowner and his officers have the dangers of wind and weather, tides and currents, fogs, ice, and snow, and hidden rocks to contend with. A small error in navigation, an insufficient allowance for tide and current, or the weather affecting the compasses, may put a ship ashore and cause injuries and loss of life."

The conclusions at which I have arrived, after consideration of the different views suggested, are as follows:—(1) When ships are in home ports let shipowners be responsible in the same way as other employers of labour are responsible—that is to say, let them be responsible (*a*) for accidents occurring through defective gearing, whether such defect is due to the shipowner's own fault or to that of some one responsible for seeing as to its being kept in an efficient state; (*b*) for injuries occurring through the negligence of master or mate while exercising superintendence in connection with operations in the ship; (*c*) for accidents occurring to seamen through their having conformed to the orders of boatswains or other petty officers where there has been negligence on the part of such petty officer; and (*d*) where the

accident has come about through faulty rules on the shipowner's part.

When the ship is not in a home port shipowners should not be responsible for accidents which have been caused by errors in navigation or negligent navigation (if there be room for distinction between the two phrases), provided there has been due diligence on the part of the owners with reference to qualifications before appointment; but let shipowners be responsible (*a*) not only for injury resulting through faults in gearing which were existent when the ship started, but also through defects which have come about after sailing, and which master or mate failed to put right when there was no valid reason for this not having been done. I incline to think that such a provision as this would certainly lead to greater security for life and limb to seamen. If shipowners were to know that they were to be responsible for accidents occurring in the way indicated, there would be no doubt that they would impress their captains with the necessity of constant watchfulness over the gearing of the ship, and so far as this matter is concerned I confess I do not see any valid reason for drawing a distinction between employers of labour on shore and at sea respectively; (*b*) I would further be inclined to make shipowners responsible for accidents occurring at sea owing to negligent orders of master or mate, (*c*) but not through conformance to negligent orders of petty officers; (*d*) I can see no good ground for refusing to make shipowners liable where accident has come about to seamen through some faulty rules. At common law I imagine there is such liability, although it might be met with the defence that the sailor was in the knowledge of the faulty

system and had accepted the risk as incident to the employment. That defence, as I explain later on, is one which I think in equity should be wholly swept away.

In the article which I quoted there was a reference to a proposed fund to which seamen and shipowners should jointly contribute. Although that article was written in April last, I am not at present aware of any definite progress which has been made in connection with it. I think it is well deserving consideration, if this proposal culminates in the definite establishment of such a fund, whether seamen and shipowners should not be permitted to contract out of the Act in the way discussed in connection with the second and third resolutions of the Committee.

Before passing from this important question it may be interesting to glance at the laws of the principal foreign countries with regard to the matter under discussion, which we are enabled to do with some assurance of accuracy from the official reports received in answer to the circular of Lord Rosebery. Three questions were propounded by Lord Rosebery touching this matter, being the last of those addressed by him, namely, the 11th, 12th, and 13th, and these are couched in the following terms:—“(11) Is the liability of shipowners for injuries suffered by sailors in their employment governed by the general law of the liability of employers? (12) If special legal provisions exist in the case of shipping, what are those provisions?” and “(13) Is the shipowners’ liability limited to (the nationality addressed) sailors, or does it extend to those of other nationalities in his employment?”

The answers to these questions as regards France are as follow:—“(11) The responsibility of ship-

owners in the case of injury to the sailors employed by them is the same as that of employers in general; they are subject to the common law (see *ante*, p. 374).

(12) There are no special provisions in the case of shipping as regards the responsibility of employers.

(13) The responsibility of shipowners exists indiscriminately as regards French sailors and sailors of foreign nationality."

In Germany the following is the report:—"As yet there are no legal provisions respecting the liability of shipowners for injuries suffered by sailors in their employ, but a law is being prepared at the present moment (date of communication, May 7th, 1886) in order to extend the principles of the 'Unfallversicherungs-Gesetz' to this class (see p. 337). For the time being shipowners have only to provide for sailors in case of illness for a certain time (three to six months) (Seemannsordnung vom 27 December, 1872, s. 48). This law applies to sailors of all nationalities in the shipowner's employ."

As to Austria, the following excerpt from Mr. Phipps's report (Her Majesty's Secretary of Embassy) may be given:—"As regards, finally, the question of the liability of shipowners treated of in queries 11, 12, and 13, I have been unable to obtain any reliable information in Vienna. Her Majesty's Acting-Consul at Trieste writes to me that he had some time ago referred to the maritime authorities for information, which he as yet had failed to obtain. He, however, writes—"The main points are that captains and owners are liable for all expenses in cases of injury in service or common illness. Injury or illness brought on by the seaman's fault enables the captain to discharge him, and thus frees himself from responsibility. In the first



case (injury in service), besides expenses, the man's wages continue to run till he enters ship service again. In case of a foreigner the liability is the same, but may be commuted for two months' pay.'"

Italy has a large seaboard, and it is therefore not surprising to find that there is special legislation affecting seamen and shipowners. In Mr. Beauclerk's report there is the following important passage with reference to this matter :—

"The liability of shipowners for injuries suffered by sailors in their employment is governed by special legal provisions contained in the Commercial Code, art. 537, and those immediately following, to the effect that :

"Sailors who become ill, or are wounded in the service of the ship, will receive their wages, and their medical expenses will be paid by the owners. If the sailor has to be landed, the captain must deposit with his consul the amount considered necessary for his cure and return home ; but in no case has the sick or injured seaman a right to more than four months' wages and hospital expenses.

"If the sailor is injured or falls sick from his own fault, or whilst ashore without leave, he must pay his medical expenses himself, but the captain must advance the money to him. In case of the death of the sailor during the voyage, his wages must be paid to his heirs in proportions determined by the period for which he has been engaged.

"Foreigners, if duly and properly shipped on Italian vessels, are treated on precisely the same footing as Italian subjects.

"The legislation on this subject is very similar to that of Great Britain, but not precisely identical with it.

“ Under the Code of Mercantile Marine (art. 56), shipowners are bound to contribute to the Merchant Navy Invalids’ Fund. They are not liable for the cost of the repatriation of sailors shipwrecked abroad, or landed through stress of circumstances, such as the abandonment of the vessel ; but these expenses fall on the value of the salvage.

“ Captains who break the above rules are liable to punishments set forth in other articles of the Code, and by art. 369, if the captain or owner through negligence or fault of his own causes any accident resulting in the death or injury of a sailor or other person on board, he is liable to six months’ imprisonment, and to suspension or dismissal from the service.

“ Thus it appears that, according to the law, the captain is criminally liable for injury arising from his fault or negligence, and the hospital expenses and wages of the injured person must be paid within the limits above mentioned, but no further compensation is due from the shipowner under the laws governing shipping ; and the law on the responsibility of employers, which has been before the Italian Parliament, would probably not be held to affect the shipowners.”

In Belgium we have the following passage in M. Gosselin’s report :—“ Lastly, with regard to the liability of Belgian shipowners for the injuries suffered by sailors in their employment, it appears that there is no special law in this country affecting shipowners, whose responsibility and that of their captains and masters is regulated by article 1384 of the Civil Code quoted above (see p. 384). The responsibility extends to the acts of all the crew of the vessel to whatever

nationality they may belong ; the ship's flag alone determines the responsibility for acts done by all or any of her crew."

The following is an excerpt from an enclosure transmitted to Lord Rosebery in connection with the Netherlands :—

" The articles of the 'Code de Commerce,' which are also cited in the Note of the Minister for Foreign Affairs, and which are of no more recent date than those of the 'Code Civil,' may be said to bear more directly upon the liability of owners of ships as to freight and cargo than towards the officers and sailors employed on board.

" Any of the crew falling ill during the voyage, or who may be wounded or mutilated in the ship's service, or in an action with an enemy or with pirates, is entitled to his wages and to surgical or medical treatment, and in case of mutilation to an indemnity to be fixed by a judicial arbitration, if there is any dispute as to the amount.

" If the sick or wounded person is unable to proceed on the voyage without danger, the treatment, etc., is to be continued until he is cured, the captain providing for the expense before starting. He is entitled to his wages not only during treatment, but until the day when he might have returned to the port from which the ship started, as well as to the cost of his return voyage.

" If, however, an officer or sailor falls ill, or is wounded or mutilated on shore, when absent from his ship without leave, the expense of his treatment, etc., must be paid by himself.

" An officer or sailor captured on board his ship and

made a slave cannot claim the price of his ransom, but is entitled to his wages up to the date of his having been taken and enslaved. If taken and enslaved when sent out to sea, or on duty on shore in the ship's service, he is entitled to the full payment of his wages, and, if the ship arrives safely at its destination, to an indemnity for his ransom."

In Switzerland the following is the answer:—"11, 12, 13. For obvious reasons the Swiss law has no provision for these cases."

As to Sweden and Norway there is no information, for the reason given, however inadequate the excuse may seem to be (p. 386).

The information as to America is meagre. The following passage has reference to the queries under consideration:—"With regard to the liability of shipowners, they are liable in the same manner under the general common law as other employers for injuries occasioned by themselves, but not for those caused by the act of an employé. A sailor who is injured in the course of his duty is entitled to his wages, and to be cured at the expense of his ship. There is a special statute in the State of New York for cruel and unusual punishment of sailors; but this is a criminal law, and confined to American ships and crews. The shipowner's liability extends to all sailors employed in American ships."

The different laws of these countries are no doubt interesting and important with regard to the question under discussion. At the same time it is very obvious that the nationality and the different circumstances affecting each nationality have a decisive bearing on the question of whether the law applicable to one

State is desirable for another. In Great Britain it is, I imagine, tolerably clear that if protective provisions with regard to seamen were to have the effect of sweeping away Britain's position as that of the nationality owning the greatest mercantile marine afloat, these would be alike disastrous to shipowners, to seamen, and to the nation itself. I do not think in what I have indicated as advisable legislation I have gone beyond the golden mean which may alike be accepted by shipowners and seamen—*In medio tutissimus ibis*.

The ninth is the concluding resolution of the Committee, and practically therefore sums up their recommendations as to a change of law. In dealing with those resolutions I have incidentally referred to topics mixed up with the points more directly suggested. Still, however, it appears to me there are several matters affecting the question of Employers' Liability which have not been touched on, and as to which I submit with some confidence it is desirable there should be an amendment of law.

(1) *Amendment suggested as to the plea of working in face of a known danger.* It was pointed out (pp. 97-104 inclusive) how the First and Second Divisions of the Court of Session have pronounced opposite judgments with regard to the effect to be given to the plea of working in the face of a known danger and accepting the risk as one incident to the employment. The First Division, in the cases of *M'Gee v. Eglinton Iron Co.* and *Wilson v. Wishaw Coal Co.*, held that at common law, where a man knowingly incurs a risk, he cannot recover damages from his employer if the known danger has culminated in personal injury, or his representatives cannot recover if fatal results have super-



vened, even although the master's system was an unnecessarily dangerous and defective one. The Second Division, on the other hand, in the cases of *Murdoch v. M'Kinnon* and *Grant v. Drysdale*, declined to give effect to this plea in circumstances of a precisely analogous kind. In *Grant's* case, Lord Young said :—" But it is contended pursuer, knowing of the faulty and dangerous arrangement, as I assume he did, and choosing to work under it, is barred from complaining of it, and so is precluded from recovering compensation for the injuries he sustained in consequence of it. I cannot assent to this contention."

English authority is clearly in favour of the view taken by the First Division (see cases referred to *ante*, p. 94).

The state of matters, then, is that in England the law is that laid down by the First Division. In Scotland there is a conflict of authority. It is desirable in any view that this conflict should in some way or other be put an end to. But, as previously indicated, I am very distinctly of opinion that, while the weight of legal authority is against the position taken up by the Second Division, their view is certainly that which commends itself to equity. The doctrine upon which the plea in question is based is that of implied contract. The theory of the law has been not to do anything which might interfere with the freedom of contract. That theory will be knocked on the head by the amending Employers' Liability Act. At all events, as the witnesses examined and the members of the Committee which last sat are all practically agreed that it shall not be legal to contract out of the amending Act, it seems at least probable that this will be the result.

Now, if this be done, I submit any justification for retaining the law as laid down by the First Division will be wholly swept away.

It is competent, say Messrs. Roberts and Wallace, "to any employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on his part, and though it may not be humane so to carry on his works as to expose his workmen to peril of their lives, no right of action arises for an injury which is thereby occasioned when the workman has been informed of all the facts, or is acquainted with the danger, and voluntarily incurs it." Surely this statement of the law is *per se* sufficient to condemn it on the ground of equity. It is unjust that a working man should have the compulsion applied to him of refusing work, and possibly facing starvation not for himself only, but for wife and family, or if accepting work which he knows to be dangerous, and working on an unnecessarily dangerous and improper system, to have no claim for reparation if maimed or incapacitated through what is plainly the master's fault.

No doubt, if the decision in *Weblin v. Ballard*, 17 Q.B.D. 122, is sound (see *ante*, 243), there is a certain exception in actions laid on the Employers' Liability Act, 1880, which in certain special circumstances may preclude the master founding on the plea referred to. But then this exception is only pleadable in very special circumstances.

I submit that the time has now come to remedy what I think is distinctly a blot in the present state of the law.

I suggest that a clause should be added to the proposed amending Act to the following effect:—From and after the passing of the Act it shall no longer be a good defence to any action brought at common law, or under the provisions of any statute, for compensation by a workman injured in the course of his employment, or by the representatives of a deceased workman, that said workman came by his injury or death through a known danger, and had accepted the risk as incident to the employment, if the employer was himself in the knowledge of a defect in way, works, plant, or machinery through which the accident came about, or was working on an unnecessarily dangerous system, or otherwise not taking due precautions to avoid the danger which brought about the accident causing injury or death.

(2) *Amendment suggested as to period within which action must be brought.* We have seen that under the existing Employers' Liability Act the action, if founded on the provisions of the statute, must be brought within six months of the date of the accident. A startling example of the injustice inflicted by this provision is afforded in the case of *Johnston v. Shaw*, 21 S.L.R. 246 (see *ante*, p. 158). The pursuer in this case averred that shortly after the accident, and in consequence of it, his mind became impaired, leading to confinement in a lunatic asylum, where he was detained till six months after the accident. The action *inter alia* was defended on the ground that by the fourth section of the Act the action was not maintainable, and Lord Adam was forced by the terms of the section referred to to give effect to this plea. I propose a very simple amendment with reference to remedying

what at least is an apparent injustice. Let the six months remain as before an imperative limit within which the action must be raised in the ordinary case, but let it be amended to this effect, that, wherever there was reasonable excuse owing to illness or disability due to the accident, for the action not having been brought within said period, it should be in the power of the Judge to permit the action to proceed, although brought at a later date than six months after the accident.

(3) *Amendment suggested in connection with the present law as to the plea of common employment.* I pointed out at an early stage of this work that the well-known cases of *Woodhead v. Gartness Mineral Company* (4 R. 469) and *Wingate v. Monkland Iron Company* (12 R. 91) were opposed to English law (see *ante*, p. 81). In the first-named of these cases—the Lord Justice-Clerk dissenting—it was held that a pursuer who was the servant of a contractor in a pit could not recover damages against the owner of a pit because the officials of the pit through whose negligence the accident was said to have come about were to be regarded as in common employment with him, and, therefore, that the lessee of the pit was not liable. In *Wingate's* case, an apprentice to a mining engineer who had gone down a pit to make certain plans, partly at least for behoof of the lessee of the pit, and was injured through the fault of a fireman in the lessee's employment, was barred from recovering damages from the lessee on the same theory of common employment which was given effect to in *Woodhead's* case.

I do not presume to say whether the English view

or the Scotch view is right, but surely there ought to be assimilation of the laws of the two countries. Apart, however, from the general desirability of assimilating the law as to this point, a very curious anomaly is arrived at by the operation of the Employers' Liability Act. That anomaly was illustrated very markedly in the case of *Nicol v. Craig*, referred to *ante*, 91 and 92; see also pp. 83-85. In the case referred to the pursuer, who was the servant of a grain weigher, was injured through the fault of the foreman of a stevedore. The action was brought against the stevedore. The grain weigher and the stevedore were both engaged in the disembarkation of grain. The stevedore's men raised the grain to a certain height in the ship and then the grain weigher's men took it, weighed it, and brought it ashore. On the authority of the cases referred to, I was forced to hold that there was community of employment, and this barred any action at common law. On the other hand, I held that as the relation of master and servant did not subsist between the defender and the injured man it was impossible to hold that any action could be maintained under the provisions of the Employers' Liability Act.

It is, I think, obvious that such a result is absurd; the injured workman, it will be seen, falls between two stools. The ordinary doctrine of law as to an employer being responsible to members of the outside public for injury received through the fault of a servant is swept away by the specialty that the pursuer is not to be regarded as one of the outside public because engaged in common employment. Yet while the injury came about through the fault of a man for whom the employer would have been responsible had the injury



been occasioned to one of his own servants, liability is escaped on the ground that in these circumstances he is not responsible under the Employers' Liability Act for an injury which has come about through the fault of his foreman because the injured man was not in his employment.

How then should this anomaly be rectified? This of course could be done by a clause repudiating the law as laid down in Woodhead's case, or otherwise it could be remedied by an employer being made responsible by statute for the fault of a foreman or superintendent of labour whereby injury had resulted to any person engaged in common employment with said foreman or superintendent.

I think I have clearly shown that it is necessary to correct this anomaly one way or other, but I do not offer an opinion as to which is the better course to follow.

(4) *Suggested amendment to make the representatives of a deceased employer in England liable for injury.* By the common law of England *actio personalis moritur cum persona*. To remedy the admitted injustice in cases where death had been caused by a fault for which the master was responsible, Lord Campbell's Act as we have seen was passed (p. 140). By this Act the representatives of the deceased were entitled to recover damages to the extent to which the injured workman could have succeeded. In other words, his right of action was transmitted to his representatives. In Scotland at common law, as has been pointed out (p. 146), there is an independent right of action at the instance of immediate ascendants or descendants of the deceased on account of the death of the son or father,

and also at that of the widow ; but while the right of the deceased was transmitted by Lord Campbell's Act to the injured man's representatives, how about the responsibility of the wrongdoer ? If the servant of a wealthy employer in England has been injured through the fault of the latter, or through the fault of servants for whom he is responsible, or even if it be the case that a member of the outside public has thus been injured, but the master dies before the action is initiated, the right of action falls because *actio personalis moritur cum persona*. In Scotland the estate of the deceased is liable.

Practically, no doubt, in the case of most wealthy employers in England there is no grievance on this account, because these have generally partners. In other words, the employer is a firm and his partners are liable, *singuli in solidum*, i.e., are jointly and severally liable. If, however, the employer is merely an individual his death bars any right of action. Surely this is unjust. The estate of the deceased should be liable just as he himself would be liable if death had not supervened. I submit there is good reason for assimilating the law of England to that of Scotland in this matter.

(5) *Amendment suggested with regard to extrajudicial expenses.* The Employers' Liability Act, 1880, is essentially an Act for the benefit of workmen. It is, I submit, desirable that the Legislature should see that where an action has been brought and compensation has been awarded that the workman and no one else shall have the benefit of the sum decerned for. As everyone, however, acquainted with the subject knows, what are called extrajudicial expenses

have a very important bearing upon the amount actually realized by the injured workman, and where an action in his name has been brought to a successful conclusion. Decree, let us say, has been pronounced in favour of the workman for £50 with expenses. An account of judicial expenses of £40 is lodged by the agent; off this sum £15 is taxed. Further, the agent has certain other expenses or claims as against his client which he knows would, as matter of course, not be entertained by the auditor of Court as between party and party, amounting we will say to £10. What in the usual case is the result? The agent puts the £15 taxed off the judicial account into the account as against his client, adds the £10 previously referred to, and the workman only gets £25. This, I take it, is stating the case in a very moderate way with regard to what sometimes happens in connection with cases of the kind.

I incline to believe that there is no difficulty whatever in procuring the services of agents in an employers' liability case. I will go farther, and say that I do not believe there would be any difficulty in procuring agents efficient enough for the conduct of such cases if their legal charges were limited strictly to the charges they are entitled to make as between party and party. It is to be remembered that the working man for whom the action is brought is as a rule destitute of funds, and the cases are frequently, if not generally, taken up on what is known as speculation. It is not, I submit, desirable that the cases should be looked at from the agent's point of view regarding these from the aggregate, and that one successful case is to be balanced against three or four unsuccessful cases. They

should be treated from the point of view of each individual case. I see no objection to a revised table of fees with regard to this distinctive class of cases, dealing with them in a liberal way as in the question between party and party, but as matter of public policy it seems to me extremely desirable that the injured workman or his representatives should obtain the full sum to which he or they are found entitled by a Court of law.

I think it is eminently desirable that the above suggestion should be considered by Parliament; but should it be thought that there are insuperable objections to it (although I am unable to see myself what these can be), I venture to submit another proposal which may be regarded as of a less drastic character to prevent what has undoubtedly been felt as a gross hardship in many cases. If extrajudicial expenses are to be allowed at all in this class of cases, let it be imperative to lodge with the Sheriff-Clerk or the Court of Session Clerk, as the case may be, along with the account of judicial expenses, an account of the extrajudicial expenses, and let these only be a legal charge to such an extent as the Court after inquiry by remit or otherwise may think fit to allow.

As the law stands no doubt the working man might say to his agent, I object to this account, and insist on taxation of some kind, but, as may well be imagined, a working man does not in the usual case think of fighting with his own lawyer, and accepts his dictum that the charges are moderate and proper. Besides, the latitude as to charges as between agent and client is a very great one, and it is reasonable that the Court should step in to say whether the charges were such

as there was any necessity in the circumstances that the client should be subjected to.

(6) *Suggested amendment on the Guardianship of Infants Act in connection with a valid discharge on behalf of minor children.* We have seen (p. 260) that by the recent Guardianship of Infants Act a mother in the event of the father's death is made the guardian of her pupil children, and as such is entitled to give a legal discharge for any sums awarded to such children on account of the death of the father through accident. I am not in the meantime disputing the reasonableness of this provision, but it may be pointed out that it is anomalous and absurd with regard to one point to be immediately noted. The mother is in right to discharge the sums to be received by the pupil children; but if they are not sums which can be regarded as small enough for alimient and education merely, she cannot discharge the sums to be received by minors even conjointly with them (see the case of *Jack v. N. B. Ry. Co.*, p. 262). The absurdity of this seems demonstrable from the fact that when in the natural course of time pupilarity changes to minority the mother would remain in the custody of the funds allocated to the pupil. Hence the mother could give a valid discharge for the sum to be allocated to a pupil boy of thirteen, but could not do so even with the girl herself for a younger female child of twelve. Logically it surely would seem that if the Legislature were right in passing the provisions of the Guardianship of Infants Act, it should extend its provisions to the effect of making the mother, along with minor children, *in titulo* to give a valid discharge for any sums to be allocated to them.



(7) *Suggested amendment as to the protection of funds for children.* But this leads me to a further and I think a more important point.

Numerous actions are raised on account of accidents which have been sustained by children. These may either be in the name of the father, if the child be a pupil, or in the child's name with consent of the father as curator-at-law if the child be a minor. There is no distinction in the case whether the action be one arising out of an accident to a child who is or who is not in the employment of the defender. I do not suppose it admits of doubt that in ninety-nine cases out of a hundred where damages are recovered by a working man for injuries received by his child the child reaps no benefit thereby. In certain cases recently which have been before me, I have with consent of the pursuer's agents made arrangements by payment into the Savings Bank of a portion at least of the sum awarded as compensation, and thus secured its disposal for the child's behoof. A similar course was adopted in the Second Division in the case of *Sharp v. the Pathhead Spinning Co.* (12 R. 574). Looking, however, to the fact that the father is the child's lawful guardian, it is doubtful whether without express consent this course can be competently adopted, and the Court, as previously pointed out, is at present totally in the dark as to what amount of the sum awarded in compensation may be deducted by the agent in name of extrajudicial expenses. I would venture to suggest that in all cases where a sum in name of damages is awarded for injury to a child the Court shall have a discretionary power to take such steps as may seem to it meet for securing that the sum awarded shall be really applied for behoof of the child.

To a limited extent, namely to £30, the National Security Savings Bank is willing to undertake this duty.

(8) *Suggested amendment as to the law in connection with alleged defects in machinery and plant.* I pointed out (pp. 44 *et seq.*) that in the Scotch cases of *Fraser v. Fraser and Walker v. Olsen* (9 R. 896 and 946 respectively) the Second Division laid down that where an accident happened in some unexplained way through some defect in machinery or gearing that there was a presumption of fault on the part of the master which could only be redargued by the master showing that it was due to something for which he was blameless, and that if this could not be done by him he was liable. I endeavoured to show that this theory was contrary to the previously accepted law both in England and Scotland, and I submitted that it was contrary not only to law, but to equity. These decisions, however, are at present binding upon the inferior Courts of Scotland. If I am right in the view indicated, it is, I submit, just that the matter should be remedied by legislation; but at all events it seems tolerably clear that there should be no difference as to the law of England and Scotland in this matter. If, therefore, these decisions were right, the law of England should be assimilated to that of Scotland as interpreted by the judgments referred to. If, on the other hand, Parliament should come to the conclusion that the theory of law which the Second Division gave effect to is erroneous, this interpretation of Scotch law should be expressly repudiated.

(9) *Suggested amendment in connection with the law laid down in Griffiths v. Dudley.* If, as we have seen

is probable in the general case, contracting out of the Act is made illegal, and hence null and void, the point to which I am about to refer will not require to be considered. If, however, this power to contract out be retained in the amending Act when it passes into law, then I submit that it is well worthy of attention.

In England (see p. 143), in the case of *Griffiths v. Earl of Dudley* (9 Q.B.D. 357), it was expressly ruled that if a workman had contracted himself out of the Act there was no right of action on the part of his widow or children on account of his death. In Scotland, I endeavoured to show, although there has been no reported case in the Court of Session on the subject, that the workman's contract would not bar the widow's or children's right of action (pp. 146 *et seq.*). It is clear, I submit, that there should be no difference of law between the two ends of the island as to this matter, and therefore it is only right that Parliament should determine which view in equity should be adopted if it be resolved not to make contracting out of the Act in the general case null and void.

It is quite open to argument that, even assuming the English view of the law to be correct in principle, it is desirable, in spite of Parliament's refusal to make the workman's contracting out of the Act illegal, still to refuse to permit the wife or children to be bound by such a contract, and to this limited extent to decline to give authority to the making of such a contract. As I endeavoured to show, the laws of the two countries with regard to this point rest upon different principles. I submit with some confidence that the principle on which Scotch law is based commends itself to equity. Be this, however, as it may, surely it

is inadvisable that the laws of England and Scotland on such a point as this should not be made one and the same.

(10) *Suggested amendment as to limiting to some extent the right to insure liability.* There is one proposal which I think is deserving consideration in connection with the existing Employers' Liability Insurance Companies. I willingly admit that it is a difficult matter to step in between these insurance companies and the insured, and to say that there shall be any limit with regard to the right of insurance. Where, however, such a proposal is made in the light of public safety it is one which I think deserves consideration. The Employers' Liability Act was passed with the object of securing greater safety to the lives and limbs of workpeople, and in the evidence led before the Committee it was prominently brought out that the system of insurance with Employers' Liability Companies, by furnishing complete immunity to the insured on the payment merely of an annual premium, in the case of many masters has practically led to their not taking that personal care as to precautions against accident which it was hoped would have been the result in all cases. It may be remembered in one of Mr. Chamberlain's Bills it was contemplated to make it illegal for shipowners to insure their liability beyond a certain proportion of the value of a ship. Is there any sound reason for refusing to apply the principle which led to the suggestion in Mr. Chamberlain's Bill to the case of Employers' Liability? I submit that it is worthy of attention whether Parliament should not make it null and void and illegal for an employer to insure his liability under the Employers' Liability Act to the full

extent. I do not presume to dogmatize as to what the proportion should be, but I think it is deserving the consideration of Parliament as to whether liability should be permitted to be insured beyond three-fourths, four-fifths, five-sixths, or whatever proportion Parliament should determine on if the principle was assented to.

I have some reason for believing that such a proposal would not be resisted by Employers' Liability Insurance Companies themselves. A manager of one of these informed me that in many cases they found the greatest difficulty in getting masters insured with them to take trouble in seeing to procuring essential witnesses because they had no personal interest in the matter.

(11) *Suggested consolidation of the law of Employers' Liability.* Finally, these proposals as to assimilation of the law with regard to individual points lead up to a more comprehensive suggestion. Would it not be reasonably possible now to frame a complete code as to the law of liability for accidents, embracing not only definite provisions as to the law of liability itself, but as to procedure in the three kingdoms, having regard to the established practice in each of them respectively. The Bills of Exchange Act of 1882 has been universally recognized as a step in the right direction, as forming a complete code with regard to one division, and that a most important one, of our commercial law. It has formed the basis of the strongly-supported proposal by Sheriff Dove Wilson for a complete code of commercial law for the three kingdoms. The Act referred to has worked smoothly and well. Are there any insuperable difficulties in sweeping away the



distinctions which at present obtain between common law and the Employers' Liability Act and merging the law in one harmonious whole? I do not believe there are, and I submit with some confidence that this is a suggestion which well deserves the attention of the present Parliament.

I do not doubt that I have omitted in this essay on the proposed amendments of the law various points well worthy of consideration; but I think I may conscientiously say that those subjects which I have brought under notice have been carefully thought over by me, and have been stated after attentive study of the evidence led in Committee, and also are so far educed from a somewhat large experience of the working of the Employers' Liability Act of 1880, as well as of numerous questions in connection with accidents which have been brought before me in my judicial capacity at common law. I will only add that if anything I have said or suggested should in any way result in the passing of an amending Act which may be of greater service to the community than it otherwise would have been, I will feel myself amply repaid for the time and trouble which I have devoted to the subject.



## APPENDIX (A) TO PARTS I.-IV.

1. The Employers' Liability Act (1880).
2. The Coal Mines Regulation Act (1872). General Rules, sec. 51.  
Sections as to Special Rules 52, *et seq.*, and Special Rules.
3. Metalliferous Mines Act (1872). General Rules, sec. 23.
4. Factory and Workshop Act (1878). Provisions as to Safety and Health.
5. County Court Rules.

### (1.) 43 AND 44 VICT., CHAPTER 42.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service. [7th September, 1880.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Where after the commencement of this Act personal injury is caused to a workman

- (1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or
- (2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or
- (3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform,

and did conform, where such injury resulted from his having so conformed ; or

- (4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or
- (5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases ; that is to say,

- (1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.
- (2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned ; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for such want of notice.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of



a penalty under any other Act of Parliament in respect of the same cause of action.

6.—(1.) Every action for recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed.

(2.) Upon the trial of any such action in a County Court before the Judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a County Court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in County Courts.

“County Court” shall, with respect to Scotland, mean the “Sheriff’s Court,” and shall, with respect to Ireland, mean the “Civil Bill Court.”

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business ; and if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post ; and in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

8. For the purposes of this Act, unless the context otherwise requires,—

The expression “ person who has superintendence entrusted to him ” means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour :

The expression “ employer ” includes a body of persons corporate or unincorporate :

The expression “ workman ” means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

9. This Act shall not come into operation until the first day of January, one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act.

10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December, one thousand eight hundred and eighty-seven, and to the end of the then next Session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

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- (2.) An Act to consolidate and amend the Acts relating to the Regulation of Coal Mines and certain other Mines. (Mines (Coal) Regulation Act.) [10th August, 1872.] 35 and 36 Vict., ch. 76.

We give the general rules set forth in sect. 51.

51. The following general rules shall be observed, so far as is reasonably practicable, in every mine to which this Act applies :

(1.) An adequate amount of ventilation shall be constantly produced in every mine, to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

(2.) In every mine in which inflammable gas has been found within the preceding twelve months, then once in every twenty-four hours if one shift of workmen is employed, and once in every twelve hours if two shifts are employed during any twenty-four hours, a competent person or competent persons, who shall be appointed for the purpose, shall, before the time for commencing work in any part of the mine, inspect with a safety lamp that part of the mine, and the roadways leading thereto, and shall make a true report of the condition thereof, so far as ventilation is concerned, and a workman shall not go to work in such part until the same and the roadways leading thereto are stated to be safe. Every such report shall be recorded without delay in a book

which shall be kept at the mine for the purpose, and shall be signed by the person making the same.

(3.) In every mine in which inflammable gas has not been found within the preceding twelve months, then once in every twenty-four hours a competent person or competent persons, who shall be appointed for the purpose, shall, so far as is reasonably practicable, immediately before time for commencing work in any part of the mine, inspect that part of the mine and the roadways leading thereto, and shall make a true report of the condition thereof so far as ventilation is concerned, and a workman shall not go to work in such part until the same and the roadways leading thereto are stated to be safe. Every report shall be recorded without delay in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same.

(4.) All entrances to any place not in actual course of working and extension, shall be properly fenced across the whole width of such entrance, so as to prevent persons inadvertently entering the same.

(5.) A station or stations shall be appointed at the entrance to the mine, or to different parts of the mine, as the case may require, and a workman shall not pass beyond any such station until the mine or part of the mine beyond the same has been inspected and stated to be safe.

(6.) If at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of noxious gases prevailing in such mine or such part thereof, or, of any cause whatever, the mine or the said part is dangerous, every workman shall be withdrawn from the mine or such part thereof as is so found dangerous, and a competent person who shall be appointed for the purpose shall inspect the mine or such part thereof as is so found dangerous, and if the danger arises from inflammable gas shall inspect the same with a locked safety lamp, and in every case shall make a true report of the condition of such mine or part thereof, and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, or for exploration, be readmitted into the mine, or such part thereof as was so found dangerous, until the same is stated by such report not to be dangerous. Every such report shall be

recorded in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same.

(7.) In every working approaching any place where there is likely to be an accumulation of explosive gas, no lamp or light other than a locked safety lamp shall be allowed or used, and whenever safety lamps are required by this Act, or by the special rules made in pursuance of this Act to be used, a competent person who shall be appointed for the purpose shall examine every safety lamp immediately before it is taken into the workings for use, and ascertain it to be secure and securely locked, and in any part of a mine in which safety lamps are so required to be used, they shall not be used until they have been so examined and found secure and securely locked, and shall not without due authority be unlocked, and in the said part of a mine a person shall not, unless he is appointed for the purpose, have in his possession any key or contrivance for opening the lock of any such safety lamp, or any lucifer match or apparatus of any kind for striking a light.

(8.) Gunpowder or other explosive or inflammable substance shall only be used in the mine underground as follows :

(a.) It shall not be stored in the mine :

(b.) It shall not be taken into the mine, except in a case or canister containing not more than four pounds :

(c.) A workman shall not have in use at one time in any one place more than one of such cases or canisters :

(d.) In charging holes for blasting, an iron or steel pricker shall not be used, and a person shall not have in his possession in the mine underground any iron or steel pricker, and an iron or steel tamping rod or stemmer shall not be used for ramming either the wadding or the first part of the tamping or stemming on the powder :

(e.) A charge of powder which has missed fire shall not be unrammed :

(f.) It shall not be taken into or be in the possession of any person in any mine, except in cartridges, and shall not be used, except in accordance with the following regulations, during three months after any inflammable gas has been found in any such mine : namely,

(1.) A competent person who shall be appointed for



the purpose shall, immediately before firing the shot, examine the place where it is to be used, and the places contiguous thereto, and shall not allow the shot to be fired unless he finds it safe to do so, and a shot shall not be fired except by or under the direction of a competent person who shall be appointed for the purpose :

(2.) If the said inflammable gas issued so freely that it showed a blue cap on the flame of the safety lamp, it shall only be used—

(a.) Either in those cases of stone drifts, stone work, and sinking of shafts, in which the ventilation is so managed that the return air from the place where the powder is used passes into the main return air course without passing any place in actual course of working ; or

(b.) When the persons ordinarily employed in the mine are out of the mine or out of the part of the mine where it is used :

(g.) Where a mine is divided into separate panels in such manner that each panel has an independent intake and return air-way from the main air course and the main return air course, the provisions of this rule with respect to gunpowder or other explosive inflammable substance shall apply to each such panel in like manner as if it were a separate mine.

(9.) Where a place is likely to contain a dangerous accumulation of water the working approaching such place shall not exceed eight feet in width, and there shall be constantly kept at a sufficient distance, not being less than five yards, in advance, at least one bore-hole near the centre of the working, and sufficient flank bore-holes on each side.

(10.) Every underground plane on which persons travel, which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding thirty yards in length) with some proper means of signalling between the stopping places and the ends of the plane, and shall be provided in every case, at intervals of not

more than twenty yards, with sufficient man-holes for places of refuge.

(11.) Every road on which persons travel underground where the load is drawn by a horse or other animal shall be provided, at intervals of not more than fifty yards, with sufficient man-holes, or with a space for a place of refuge, which space shall be of sufficient length, and of at least three feet in width, between the waggons running on the tramroad and the side of such road.

(12.) Every man-hole and space for a place of refuge shall be constantly kept clear, and no person shall place anything in a man-hole or such space so as to prevent access thereto.

(13.) The top of every shaft which for the time being is out of use, or used only as an air shaft, shall be securely fenced.

(14.) The top and all entrances between the top and bottom of every working or pumping shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations, if proper precautions are used.

(15.) Where the natural strata are not safe, every working or pumping shaft shall be securely cased, lined, or otherwise made secure.

(16.) The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working place which is not so made secure.

(17.) Where there is a downcast and furnace shaft, and both such shafts are provided with apparatus in use for raising and lowering persons, every person employed in the mine shall, upon giving reasonable notice, have the option of using the downcast shaft.

(18.) In any mine which is usually entered by means of machinery, a competent person of such age as prescribed by this Act shall be appointed for the purpose of working the machinery which is employed in lowering and raising persons therein, and shall attend for the said purpose during the whole time that any person is below ground in the mine.

(19.) Every working shaft used for the purpose of drawing

minerals or for the lowering or raising of persons shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in work between the surface and the bottom of the shaft to the surface, and from the surface to the bottom of the shaft and to every entrance for the time being in work between the surface and the bottom of the shaft.

(20.) A sufficient cover overhead shall be used when lowering or raising persons in every working shaft, except where it is worked by a windlass, or where the person is employed about the pump or some work of repair in the shaft, or where a written exemption is given by the inspector of the district.

(21.) A single linked chain shall not be used for lowering or raising persons in any working shaft or plane except for the short coupling chain attached to the cage or load.

(22.) There shall be on the drum of every machine used for lowering or raising persons such flanges or horns, and also if the drum is conical, such other appliances, as may be sufficient to prevent the rope from slipping.

(23.) There shall be attached to every machine worked by steam, water, or mechanical power and used for lowering or raising persons, an adequate break, and also a proper indicator (in addition to any mark on the rope) which shows to the person who works the machine the position of the cage or load in the shaft.

(24.) Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and be kept securely fenced.

(25.) Every steam boiler shall be provided with a proper steam gauge and water gauge, to show respectively the pressure of steam and the height of water in the boiler, and with a proper safety valve.

(26.) After dangerous gas has been found in any mine, a barometer and thermometer shall be placed above ground in a conspicuous position near the entrance to the mine.

(27.) No person shall wilfully damage, or without proper authority remove or render useless any fence, fencing, casing,

lining, guide, means of signalling, signal, cover, chain, flange, horn, break, indicator, steam gauge, water gauge, safety valve, or other appliance or thing provided in any mine in compliance with this Act.

(28.) Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Act or the special rules.

(29.) A competent person or competent persons who shall be appointed for the purpose shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, and the state of the head gear, working places, levels, planes, ropes, chains, and other works of the mine which are in actual use, and once at least in every week shall examine the state of the shafts by which persons ascend or descend, and the guides or conductors therein, and shall make a true report of the result of such examination, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the person who made the same.

(30.) The persons employed in a mine may from time to time appoint two of their number to inspect the mine at their own cost, and the persons so appointed shall be allowed, once at least in every month, accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officers of the mine, to go to every part of the mine, and to inspect the shafts, levels, planes, working places, return air-ways, ventilating apparatus, old workings, and machinery, and shall be afforded by the owner, agent, and manager, and all persons in the mine, every facility for the purpose of such inspection, and shall make a true report of the result of such inspection, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the persons who made the same.

(31.) The books mentioned in this section, or a copy thereof, shall be kept at the office at the mine, and any inspector under this Act, and any person employed in the mine, may, at all reasonable times, inspect and take copies of and extracts from any such books.

Every person who contravenes or does not comply with any of

the general rules in this section shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

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### SPECIAL RULES.

52. There shall be established in every mine to which this Act applies such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine or employed in or about the same as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, and such special rules, when established, shall be signed by the inspector who is inspector of the district at the time such rules are established, and shall be observed in and about every such mine, in the same manner as if they were enacted in this Act.

If any person who is bound to observe the special rules established for any mine acts in contravention of or fails to comply with any of such special rules, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine so as to prevent such contravention or non-compliance, shall each be guilty of an offence against this Act.

53. The owner, agent, or manager of every mine to which this Act applies shall frame and transmit to the inspector of the district, for approval by a Secretary of State, special rules for such mine within three months after the commencement of this



Act, or within three months after the commencement (if subsequent to the commencement of this Act) of any working for the purpose of opening a new mine or of renewing the working of an old mine.

The proposed special rules, together with a printed notice specifying that any objection to such rules on the ground of anything contained therein or omitted therefrom may be sent by any of the persons employed in the mine to the inspector of the district, at his address, stated in such notice, shall, during not less than two weeks before such rules are transmitted to the inspector, be posted up in like manner as is provided in this Act respecting the publication of special rules for the information of persons employed in the mine, and a certificate that such rules and notice have been so posted up shall be sent to the inspector with the rules, signed by the person sending the same.

If the rules are not objected to by the Secretary of State within forty days after their receipt by the inspector, they shall be established.

54. If the Secretary of State is of opinion that the proposed special rules so transmitted, or any of them, do not sufficiently provide for the prevention of dangerous accidents in the mine, or for the safety of the persons employed in or about the mine, or are unreasonable, he may, within forty days after the rules are received by the inspector, object to the rules, and propose to the owner, agent, or manager in writing any modifications in the rules by way either of omission, alteration, substitution, or addition.

If the owner, agent, or manager does not, within twenty days after the modifications proposed by the Secretary of State are received by him, object in writing to them, the proposed special rules, with such modifications, shall be established.

If the owner, agent, or manager sends his objection in writing within the said twenty days to the Secretary of State, the matter shall be referred to arbitration, and the date of the receipt of such objection by the Secretary of State shall be deemed to be the date of the reference, and the rules shall be established as settled by an award on arbitration.

55. After special rules are established under this Act in any

mine, the owner, agent, or manager of such mine may from time to time propose in writing to the inspector of the district, for the approval of a Secretary of State, any amendment of such rules or any new special rules, and the provisions of this Act with respect to the original special rules shall apply to all such amendments and new rules in like manner, as near as may be, as they apply to the original rules.

A Secretary of State may from time to time propose in writing to the owner, agent, or manager of the mine any new special rules, or any amendment to the special rules, and the provisions of this Act with respect to a proposal of a Secretary of State for modifying the special rules transmitted by the owner, agent, or manager of a mine shall apply to all such new special rules and amendments in like manner, as near as may be, as they apply to such proposal.

56. If the owner, agent, or manager of any mine to which this Act applies makes any false statement with respect to the posting up of the rules and notices, he shall be guilty of an offence against this Act, and if special rules for any mine are not transmitted within the time limited by this Act to the inspector for the approval of a Secretary of State, the owner, agent, or manager of a mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means, by enforcing to the best of his power the provisions of this section, to secure the transmission of such rules.

57. For the purpose of making known the special rules and the provisions of this Act to all persons employed in and about each mine to which this Act applies, an abstract of the Act, supplied on the application of the owner, agent, or manager of the mine by the inspector of the district on behalf of a Secretary of State, and an entire copy of the special rules, shall be published as follows :—

- (1.) The owner, agent, or manager of such mine shall cause such abstract and rules, with the name and address of the inspector of the district, and the name of the owner or agent and of the manager appended thereto, to be posted up in legible characters, in some conspicuous place at or near the mine, where they may be conveni-

ently read by the persons employed ; and so often as the same become defaced, obliterated, or destroyed, shall cause them to be renewed with all reasonable despatch :

- (2.) The owner, agent, or manager shall supply a printed copy of the abstract and special rules gratis to each person employed in or about the mine who applies for such copy at the office at which the persons immediately employed by such owner, agent, or manager are paid :
- (3.) Every copy of the special rules shall be kept distinct from any rules which depend only on the contract between the employer and employed.

In the event of any non-compliance with the provisions of this section by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act ; but the owner, agent, or manager of such mine shall not be deemed guilty if he prove that he had taken all reasonable means, by enforcing to the best of his power the observance of this section, to prevent such non-compliance.

58. Every person who pulls down, injures, or defaces any proposed special rules, notice, abstract, or special rules when posted up in pursuance of the provisions of this Act with respect to special rules, or any notice posted up in pursuance of the special rules, shall be guilty of an offence against this Act.

59. An inspector under this Act shall, when required, certify a copy which is shown to his satisfaction to be a true copy of any special rules which for the time being are established under this Act in any mine, and a copy so certified shall be evidence (but not to the exclusion of other proof) of such special rules and of the fact that they are duly established under this Act and have been signed by the inspector.

[The following are the Shotts Special Rules. These special rules have statutory force. In cases of coal pit accidents the special rules form matter of frequent reference and debate. We are informed that practically the special rules are the same throughout Scotland, and that although there is provision for special rules under the Metalliferous Mines Act, metalliferous mines are also worked under these or similar special rules.]

### SPECIAL RULES.

*For the conduct and guidance of the persons acting in the management of this mine, or employed in or about the same, to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, in terms of section 52 of the Statute 35 and 36 Victoria, cap. 76.*

In these special rules the word “agent” means a person having, on behalf of the owner, care and direction of any mine, or of any part thereof, and superior to the manager; the word “manager” means the certificated manager under the Act, and includes the plural as well as singular; the word “overman” means a person employed and acting under the manager, and includes plural as well as singular; the word “miners” means every person employed in the mine, in the cutting, or excavation, or removal of coal, ironstone, shale, fire-clay, or other minerals, metals, or materials.

### AGENT.

1. The agent, where one is appointed separate from the owner, shall have, as representing the owner, the care and direction of the mines committed to his charge; and it shall be his duty to take a general supervision thereof; to see that the manager attends to and performs his duties; and generally

to act as the owner's representative, and see that the mine are conducted in conformity with the requirements of the Act.

N.B.—*The agent is furnished, for his guidance, with printed copies (1) of the Act itself, (2) of the statutory abstract thereof, and (3) of the special rules.*

#### MANAGER.

2. Generally, the mine (or division of the same, when divided in terms of the statute) to which the manager has been appointed, shall be under the control and daily supervision of the manager, whose duty it shall be to carry out, and see carried out, the various provisions of the Act, so far as incumbent on him, or on those acting under his control and directions, and to see that sufficient materials and appliances are always provided for the proper carrying out of all necessary operations.—*Copies of the Statute itself, of the abstract thereof, and of these special rules, are supplied to each manager.*

#### OVERMAN.

3. Subject to the control and supervision of the manager, the whole operative details shall be under the care and charge of the overman. The overman shall see that the workmen of every class in their several departments discharge their duties; and shall receive and attend to all reports made to him as to the state of repair of the air courses, machinery, mid-wall, trap-doors, roads, cubes, or other ventilating apparatus, and working places. He shall cause remedies to be provided where needed; and shall see the general and special rules faithfully and vigorously enforced; and he shall have power to hire and discharge workmen.

4. He shall have under his immediate and special charge the shafts, slides, pumps, and relative fittings, all of which he shall keep safe and efficient.

5. He shall attend to the ventilation, in terms of general rule No. 1; and to the observance of the other general rules in section 51, so far as these, from their nature, can be observed by himself, or fall to be observed by others under his charge.



6. He shall perform the special duties, as to the examination of machinery and others, set forth in general rule No. 29.

7. He shall see that a plentiful supply of timber, for props and other purposes, required by the workmen to carry on their operations with safety to themselves, is always ready : and shall cause the same to be cut in proper lengths, and laid down in the working-places, as provided for in rule 28.

8. He shall, without delay, report to the manager, or agent, or owner any matter or thing coming under his notice, necessary to be observed or carried out, with a view to compliance with the general or special rules which he cannot himself perform.

N.B.—*Copies of the Statute itself, of the abstract thereof, and of these special rules, supplied to each overman.*

PITHEADMAN (OR BANKSMAN).

9. The pitheadman, during the several shifts, if more than one, shall, subject to the control and supervision of the manager, have charge of the workmen employed about the pithead, and each workman shall act under his directions. He shall observe that, at all times, there is sent down the pit a stock of timber for props and other necessary purposes, for the use of the miners and other workmen, and report to the manager, if at any time he observes, or has it reported to him, that there is a deficiency of such timber or other articles. He shall superintend and direct the safe removal from the cage of all loaded hutches arriving at the pithead, and see to the safe replacing of the return hutches on the cage. He shall be in attendance in the morning, or at such other time of the day as the miners' shift commences, and shall see that no person is allowed to go upon the cage until the engineman has ascertained and reported the safety of so doing, in terms of special rule 16. He shall regulate the number of men descending at a time, taking care that not more than *four* to a single cage, or *eight* to a double cage, shall ride on such cages respectively, and no one along with a hutch.

10. The pitheadman (in absence of some other person specially appointed for the purpose, and independently of the manager or overman), shall, once at least in every twenty-four hours, care-

fully inspect the ropes, chains, slides, pithead frame, and other apparatus used for the lowering and raising of the cages, so far as exposed to his observation ; and if he discover, or be informed of, any defect or weakness, likely to produce danger, he shall stop the raising or lowering of men or materials, until such defect or weakness be remedied. He shall also be careful to prevent the fall of any stone, coal, or other substance, into the shaft, from the surface, and shall communicate to the manager or overman any necessity for a skilled person being employed to rectify any defect in the shaft, ropes, chains, pithead frame, and other apparatus.

11. It shall be his duty to see that the shaft is securely fenced in, at the close of the shift.

12. In absence of a "weigher," specially appointed for the purpose, it shall be the duty of the pitheadman to act as weigher, and to see that all tubs or hutches are properly filled with the "mineral contracted to be gotten," and that the proper deductions are made in respect of stones or materials, other than the minerals contracted to be gotten, or in respect of tubs, baskets, or hutches improperly filled—in terms of section 17 of the Act.

#### WEIGHER.

13. Where a person is specially appointed as weigher, it shall be his duty to attend to the matters embraced in the immediately preceding rule.

#### ENGINEMAN AND BRAKESMAN.

14. The engineman at the pithead shall, during the hours of his shift, remain continually in charge of, and so near his engine, as at all times to have it completely and entirely under his control. He shall be careful that the engines and boilers are always in good working condition, and that the pumps and whole machinery and gearing connected with his engines are in a safe and effective state, and any fly wheel, or exposed and dangerous parts of the machinery securely fenced. He shall have charge of the furnacemen, where these are employed, and be responsible for the regularity with which steam is kept up, and for the proper state of the boilers. He shall have steam

raised, and the engine and machinery in working order, in time to allow the firemen, roadsmen, overman, or manager to descend the pit to examine the condition of the mine, before the miners' or other workmen's shift shall commence.

15. He shall see that the signalling arrangements on the top are kept in good order; shall thoroughly acquaint himself with, and shall watch and attend to the various signals made for raising or lowering the cage, whether laden with men or materials, or when empty—shall carefully and exactly set down the cage at the landing places—shall observe the indicator attached to the machinery, showing the position of the load in the shaft, and manage the brake connected with the engine. The engineman shall further attend to and see that any steam and water gauges, and safety valve, attached to the steam boiler, are kept in good order.

16. Before allowing the descent of workmen into the mine on any morning, the engineman shall be bound to run each cage at least once from the pit-head to the pit-bottom, to ascertain whether everything is right, and if any defect shall be discovered he shall stop the engine, and shall not on any pretext allow the descent of workmen until the matter has been reported to the manager, overman, or person in charge, who shall direct what remedy shall be necessary. The engineman shall not allow any workman to descend the pit until the fireman shall have reported the safety of doing so.

17. He is prohibited from allowing any person whatever to interfere with the engine, in any way, while being wrought, and from allowing or permitting any person other than those authorized by the owner, agent, manager or overman, to enter or remain in the engine-house.

18. He shall attend to all signals, and make the necessary return signals, which shall be as follows:—

19. The bottomer, or person acting in his absence, shall make the following signals from the bottom, being those appointed in this mine for guiding the ascent of the cage, and

20. He shall strike or ring the signal bell *once*, for the ascent of the cage, whether loaded or empty.

21. The engineman shall make a counter signal of *two* strokes

of the signal bell from the top, if there be any reason why the cage should not ascend, and in case the signal mentioned in special rule 20 be given at any time when the cage is in motion, the engineman shall immediately stop the engine.

22. The bottomer shall strike or ring the signal bell *thrice*, in rapid succession, intimating that men are about to ascend, when the engineman shall signal that all is ready by giving *one* stroke of the signal bell from the top; thereupon the bottomer shall make the usual ascent signal of *one* stroke of the bell, whereupon the cage shall be raised.

23. The bottomer shall strike or ring the signal bell *twice*, when he desires the engine to be reversed, and the ascending cage returned to the pit-bottom, and to remain there.

23A. Where there is an inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom, the engineman and brakesman shall give and receive the signals noted in rules 51c, 51d, and 51e.

N.B.—*Copies of the abstract of the Act and of the special rules are furnished to the engineman.*

#### FURNACEMEN.

24. Subject to the control of the manager or overman, the furnaceman shall act under and obey the directions of the engineman.

#### ROADSMEN.

25. The roadsmen, in their different divisions and shifts, if more than one, shall, at least daily, make careful inspection of the whole roadways and working places, from the pit-bottom throughout the mine, and shall keep the same free from all obstructions, and of the fixed height and width, necessary for proper passage, and for ventilation. They shall repair and remedy all damages and defects in the roads of the mine, and shall examine, and put, and keep in proper condition, all trap-doors, and see the regulations enforced that the same are kept closed; and, wherever practicable, shall endeavour to make and keep such trap-doors self-acting. They shall make and place sufficient trap-doors wherever the progress of the operations of the mine shall render these necessary.

26. The roadsmen shall also lay rails on the roads, where requisite; and, in the absence of the manager or overman, they shall receive all reports or communications from the miners and other workmen as to falls and defects in the roads, roofs, and buildings, and shall proceed to, and repair or remedy, the falls and defects.

27. They shall stop the passage of men and materials, through or under defective roads, roofs, or places, until the necessary repairs shall have been executed. They shall receive information concerning any interruption in the ventilation, or of any other cause of danger, and communicate with the manager or overman immediately, and shall aid and assist in the rectification and remedy of the same, and shall, when so employed, be permitted to use only safety lamps, in mines where inflammable gas has been found within the preceding twelve months. All lighted or combustible substances are forbidden to be used in the course of such operations.

28. It shall be the special duty of the roadsmen, in their different divisions, if more than one, to observe that an adequate supply of timber, for props and other necessary purposes, is always ready at the place where the miners are at work, for the use of the miners in supporting the roofs and sides of their working places, and to report to the manager or overman if they shall observe any want of such timber. For the purpose of carrying out this rule, roadsmen are empowered to call upon drawers, putters, and drivers, whether employed by the owner or miner, to convey such necessary timber from the pit-bottom, or other place of general delivery, to the working places in connection with which they are employed.

29. The roadsmen shall report to the manager or overman any instances of neglect on the part of miners, in not carrying forward their faces, or walls, in accordance with the plan pursued in working the mine. They shall also examine and report to the manager or overman instances of neglect, and acts of carelessness on the part of the miners or brushers, in failing to remove, or in not removing with proper caution, the strata necessary to be removed to form roads, or in not carrying forward the brushing with sufficient regularity, and of the proper dimensions, or



in leaving the brushing with loose or hanging stones in and about the strata "brushed."

30. As removing falls from the roofs of roads and air-courses, and repairing defects therein, are within the roadsmen's duties, and as they are charged with the maintenance of all roads and passages in the mine, they are enjoined to proceed with the greatest caution—both for their own safety and the successful execution of their duties. In these operations they must therefore be careful, and are required to prevent all other workmen coming near any defective places, or interfering with them when at work. They are required to undertake no repairs of unusual magnitude or danger, without sufficient assistance, and until provided with every necessary material, which will be supplied on application to the manager or overman.

31. Without prejudice to the foregoing directions, it will be the special duty of the roadsmen to observe the matters embraced in the following general rules :

(1.) Upon discovering that any part of the mine is dangerous, in terms of general rule No. 6, to withdraw therefrom any workmen therein employed (which workmen shall be subject to the roadman's orders to that effect), and report the state of matters to the manager, overman, or fireman.

(2.) To report to the manager or overman when they observe any violation of general rule No. 8 as to use of gunpowder.

(3.) To see that every man-hole, or place of refuge, is kept clear, in terms of general rule No. 12.

(4.) To examine the roof and sides of every travelling road at least daily, and see that the roofs and sides are safe, in terms of general rule No. 16.

(5.) To report any damage to any fence, casing, lining, means of signalling, or otherwise, that may be observed, in terms of general rule No. 27.

32. Generally, the roadsmen shall observe and fulfil the whole duties falling within their departments under the statute. *They are furnished with copies of the statutory abstract, and of these special rules.*

## FIREMEN.

33. If inflammable gas has been found in the mine within the preceding twelve months—which it shall be the duty of the manager to ascertain and intimate to the fireman—then it shall be the duty of such fireman or firemen, if more than one, in their respective divisions or shifts, to perform the duties of examining and inspecting, with a safety lamp, the mine and roadways, and making the report thereon, all in terms of general rule No. 2.

34. If inflammable gas has not been found in the mine within the preceding twelve months—which it shall be the duty of the manager to ascertain and intimate to the fireman—then it shall be the duty of the fireman or firemen, if more than one, in their respective departments, to inspect the mine and roadways, and make a report, in terms of general rule No. 3.

35. In making the examinations provided for by the foregoing rules, the fireman shall mark with chalk the day of the month upon the face of each working place—as 1, 5, 10, 25, or other numbers, as the case may be. He shall be careful to ascertain that every part of the mine and roadways, so to be examined, are free from fire-damp, choke-damp, and other impurities, and are safe for workmen to enter and to work therein; and in case fire-damp or other impure air shall be discovered in any working place, road, or level, the fireman shall, in the first instance, thoroughly clear the same of such impurity—if that can be done easily—and shall thereupon report to the miners, and other workmen, that the same are safe; but if the impurity cannot be readily or at once cleared out, the miners and workmen shall not be permitted to enter any such working places, roads, or levels, until the impure air shall have been, by further appliances, entirely dispelled. He shall prevent miners or other workmen entering the roads or working places until a report shall have been made that they are safe. If no fire-damp, choke-damp, or other impurity shall be discovered, or suspected to remain after such inspection, the fireman shall make report to the miners and workmen, and allow them to proceed to work, and shall thereupon, without delay, enter such report in the book kept for the purpose.

36. If the fireman shall encounter falls from the roof, in any of the roads which he requires to traverse, or in working places under the care of the miners, he shall not proceed farther in the direction of such falls, so as to pass under the broken roof, but shall endeavour, cautiously, to ascertain if there be any accumulation of fire-damp or other impurity, in, about, or beyond the falls, so that the safest way of clearing the same may be learned, and shall proceed elsewhere through the mine to examine the unobstructed parts thereof, and to complete his inspection; whereupon the fireman shall report to the manager or overman the state of the falls, and whether free from impurity, to the end the necessary directions may be given for having the same cleared away and the roof secured; and until this shall be done, no miner or other workman shall be at liberty to proceed near, or be under the broken roof, unless employed in remedying the same.

37. In case, from any cause, the operations of the mine shall have been discontinued for an unusual length of time, and thereafter resumed, no workman shall be allowed to descend the shaft until the manager, overman, or fireman shall have first descended and reported on the state of the workings; and in discharging this duty the manager, overman, or fireman must proceed with great caution, and shall not go farther into the workings than he, from his own experience, shall deem safe; and in case there are reasonable grounds for apprehending the presence of impure air, he shall return to the pithead, and remain there until precautionary measures shall have been applied to restore the proper ventilation of the mine.

38. Without prejudice to the foregoing rules, it shall also be the duty of the fireman to fence or cause to be fenced, all entrances, in terms of general rule No. 4; as also, in going his rounds, to observe and report to the manager or overman upon the following matters embraced in the general rules:—

(1.) Any deficiency in the amount of ventilation, as provided for in terms of general rule No. 1.

(2.) Any attempt, on the part of workmen, to violate general rule No. 5, as to going beyond the appointed station.

(3.) Any violation of the terms of general rule No. 8, as to use of gunpowder.

(4.) Any failure to keep clear man-holes, in terms of general rule No. 12.

(5.) Any failure to make secure the roofs and sides of travelling roads and working places, under general rule No. 16.

(6.) Any violation of general rule No. 27, as to the damaging of fences, signals, etc.

39. It shall be the duty of the fireman, where he discovers that any part of the mine is dangerous from the presence of noxious gases, to cause the workmen to withdraw from the mine, or the part thereof so found dangerous, in terms of general rule No. 6, and all workmen shall be subject to his orders, in respect of this matter; and he shall thereupon, as the "competent person" appointed for the purpose, inspect the mine, or such parts thereof as are dangerous, in manner and to the effect provided for in said general rule, and make a report as therein provided for. Also, he shall fit up bratticing where required, of suitable height and length, so that air may be at all times conveyed from the principal air-courses for the use of the workmen, and see that all entrances are properly fenced, in terms of general rule No. 4.

40. It shall be his duty to see that the miners are attending to the security of the roofs and sides of the working places, and for that purpose to visit each working place at least three times each day at proper intervals; and in case of finding that any miner is failing so to secure his working place, by propping the same, or otherwise, to point out to such miner any such failure; and should such miner refuse or fail to perform such repairs as may be necessary to render the place secure, to require him and his assistants to remove from such working place. Besides the periodical examinations already provided for, it shall be the duty of the firemen, when applied to by any miner, stating that his working place is, in the matter of propping, in a dangerous condition, which requires the intervention of a skilled person, to proceed to such working place, examine the same, and cause such remedies to be applied as shall appear to be necessary for the safety of the place, the miner himself assisting in any necessary operation.

41. It shall likewise be the duty of the fireman or firemen

in their different departments (unless some other person shall be specially appointed) where gunpowder is being used, to act as the "competent person," in terms of general rule No. 8 (*f*), and to ascertain the state of "inflammable gas," in terms of the said general rule, and to prevent gunpowder being used otherwise than as there provided for.

N.B.—*Copies of the abstract of the Act, and of these special rules, are furnished to each fireman.*

#### BOTTOMER AND SIGNALMAN.

42. The bottomer shall attend, during the working shifts in the mine, to regulate the number of men who shall ascend on the cage at a time—to keep order among the drawers arriving with loaded hutches at the pit-bottom—to see that the loaded hutches are carefully placed on the cage, and secure them—to make the appointed signals necessary for regulating the ascent of men and materials—to examine and report to the manager on the state of the signal apparatus, and of the hutches used in the pit, and of the cages wrought in the shaft; and also on the state of the slides or guide rods in which the cage moves.

43. He shall, along with the fireman, attend to and keep in proper order, the cube or rarifying furnace in the pit, and shall also see that the signal wires and signal arrangements in the shaft are kept in good order.

44. The bottomer shall attend to and answer the signals made by the engineman from the surface.

45. He shall not allow any miner, drawer, or other worker in the pit, to make signals while he, the bottomer, is on duty.

46. He shall not suffer more than four men at a time to ascend the shaft in a single cage, nor more than eight in any double cage; he shall not allow any person to ascend along with a hutch, whether empty or loaded; and he is forbidden to signal the ascent if more than the appointed number shall go on the cage, or if any worker shall attempt to ascend with a hutch.

47. In the unavoidable temporary absence of the bottomer, the roadsman, or some other qualified person, shall make the necessary signals from the pit-bottom, and receive and attend to the signals sent from the top.



48. The bottomer, or such person acting in his absence, shall make the following signals, being those appointed in this mine for guiding the ascent of the cage :—

(1.) He shall strike or ring the signal bell at the top *once* for the ascent of the cage, whether loaded with minerals or empty, and shall observe any counter-signal, in case of any reason why the cage should not ascend.

(2.) He shall strike or ring the signal bell *thrice* in rapid success, when *men* are about to ascend ; and after a pause, during which a signal of *one* stroke of the signal bell shall be made from the top that all is ready, he shall make the usual ascent signal of *one* stroke of the bell, whereupon the cage shall be raised.

(3.) He shall strike or ring the signal bell *once*, if he observes anything wrong while the cage is in motion ; and *twice*, when he desires the engine to be reversed, and the ascending cage returned to the pit-bottom, and to remain there.

49. No deviation from these signals shall be permitted on any account. The ascending signals shall not be made until the cage with its load, whether of men or materials, are securely placed, and everything be ready for the ascent.

50. The bottomer shall not leave his post at the pit-bottom until the whole workers of his shift shall have first safely ascended the shaft.

51. He shall prevent, or report to the manager or overman upon, any neglect or violation of the general rules or special rules coming under his observation ; for which purpose copies of the abstract of the Act, and the special rules themselves, are furnished to him.

51A. Where there is an inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom, the bottomer and signalman of such inclined plane or shaft shall instruct all miners, putters, drivers, and other workmen employed in such an inclined plane or shaft, in the use of the signals as undernoted (rule 51c), and shall not allow any such persons to cage a hutch until they fully understand the working of the signals.

51B. Except as aftermentioned (rule 51E), rules 44, 45, and 48 shall not apply to an inclined plane or shaft which is run in

the seam, and in which there are stopping places between top and bottom.

51c. Miners, putters, drivers, and other workmen employed, on arriving at an inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom, where there are not more than six workmen or persons making use of such stopping place, shall make the following signals, after having been instructed by the bottomer in the use thereof:—

*Signal 1.* To intimate to the engineman or brakesman that they are waiting for the carriage—

**Raise and fix up the signal bar.**

*Signal 2.* To intimate to the engineman or brakesman that a hutch is caged, and that all is in readiness for the carriage to move off—

**Shut down the signal bar.**

*Signal 3.* To intimate to the engineman or brakesman that the carriage must be raised a little—

**Raise and lower quickly the signal bar once.**

*Signal 4.* To intimate to the engineman or brakesman that the carriage must be lowered a little—

**Raise and lower quickly the signal bar twice.**

*Signal 5.* To intimate to the engineman or brakesman that persons wish to ascend—

**Raise and lower quickly**

the signal bar three times, and fix it up; then, when all is ready at the top, the engineman or brakesman shall give the return signal—one stroke of the bell—on receipt of which they shall step on to the carriage and signal to the engineman or brakesman for the carriage to move off, by drawing the bolt which shuts down the signal bar.

51d. In an inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom,

where there is provided an alarm signal to the top, and also a signal to the top for the use of the bottomer, the alarm bell shall be used to stop the winding machinery when necessary, and when it is rung the engineman or brakesman shall instantly stop his machinery and wait for signals by the bottomer's bell.

51E. The bottomer's bell shall be rung in accordance with the directions given in rule 48.

51F. No person shall leave an inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom, without leaving the signal bar shut down.

51G. Miners, putters, drivers, and other workmen employed, on arriving at an inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom, when they have raised and fixed up the signal bar as above directed (rule 51C, signal 1), shall wait till the engineman or brakesman has stopped the carriage at their stopping place, which he will do in proper turn, and they shall not attempt to cage a hutch, or to take an empty hutch from the carriage, or to step on to the carriage until they have ascertained that the carriage has stopped exactly at the proper place.

#### MINERS AND OTHER WORKMEN.

52. Such miners and other workmen are, and shall be, generally subject to the control and orders of the agent, where one has been appointed, and of the manager and overman ; but they shall also be subject to any directions which the roadsman, engineman, fireman, or bottomer may give, in their respective departments, for the purpose of preventing the workmen from infringing, or of causing them to comply with any of the provisions of the Act, or of the general or special rules.

53. Such miners and other workmen shall not proceed into travelling roads or working places until it shall have been reported to them by the fireman, or other person appointed for the purpose, that the travelling roads and working places are safe to be entered.

54. Until such report, or intimation of safety, is so made no such miner or other workman shall pass beyond the station appointed ; and, if no other place or station has been appointed,

they shall always understand that the pithead is the station at which they are required to wait the necessary examination and report.

55. If, while at work, or at other time, any miner or workman shall discover, or be informed of, the existence of any obstruction in the ventilation, or stagnation, or impurity in the air of the mine, or the existence of any defect in the walls, roofs, or in any other parts thereof, he shall be bound to give instant information of the circumstances to the manager, overman, roadsman, or fireman, so that these defects may be remedied, and danger therefrom averted.

56. Miners are expressly forbidden to go into, or improperly near any place throughout the whole mine, where danger is known or suspected to exist. They are forbidden to continue at any part of a face where a sudden outburst of fire-damp shall happen, or where danger from any cause whatever shall apparently threaten, until the same shall have been examined and reported safe, or the impurity or other cause of danger removed.

57. The common but highly dangerous practice among miners, of testing the quantity of fire-damp escaping from a "blower," by igniting it with their lamps, is peremptorily prohibited.

58. Whether the operations shall be conducted by the "long wall" or "stoop and room" system, a sufficient number of suitable props being supplied at their working places, the same shall be set up by the miners in their working places, where the roof and sides require to be secured by them, in terms of general rule 16. These props and any necessary sprags or gibs shall be set up at such times, in such number, and at such points, within the working limits, as shall, from time to time, be necessary.

59. But, besides being bound to prop and secure according to their own skill and experience, miners are required to place props within their working places in such manner as the fireman or other person authorized to that effect shall deem necessary and shall direct, for the safety of the workmen and the mine.

60. When employed to return upon and remove stoops left in any seam, miners shall be bound to prop and secure the roof and

strata around each stoop before commencing to cut or remove the same, and such places shall be deemed "working places" under these rules.

61. If, from accident or any other cause, miners are at any time unable to find a sufficient supply of prop-wood at the place appointed, they are expressly forbidden to remain in their working places.

#### DRAWERS, PUTTERS, AND DRIVERS.

62. Drawers, putters, and drivers shall not be permitted to approach, or to enter the roads or working places, until the miners shall have been allowed to proceed thither to work. They shall carefully convey their loaded hutches to the pit-bottom, or siding, or wheel, as the case may be; and when the hutches are brought to the pit-bottom, they shall not be pushed forward till the bottomer shall have taken charge of them. All drawers, putters, and drivers shall be subject to the orders of the roadsmen in carrying out rule 28 as to the conveyance of timber to working places.

62A. Miners, putters, drivers, and other workmen employed, are forbidden to ascend or descend on foot, an engine or self-acting inclined plane or shaft which is run in the seam, and in which there are stopping places between top and bottom, without the consent and attendance of the bottomer, as also to ascend or descend upon a carriage the motive power for which is supplied by gravity or by a back balance weight.

#### BRUSHERS AND REDDSMEN.

63. Brushers and reddsmen shall, in the formation of roads, remove from the strata as much thereof as shall make them of the height and breadth required for the purposes of the mine, and shall carefully build up the side walls, and properly remove or stow away surplus material. In detaching strata, and in the use of gunpowder for blasting, great caution (and attention to the general rule No. 8) must be observed, and every fragment of stone shattered or unloosed shall be taken down. If, in the course of their operations, brushers and reddsmen shall expose a "lipe" or joint, if any of the strata, indicating the probability of



a fall at that place, or if a "blower" shall be opened, or an accumulation of gaseous substances be encountered among the metals, or if they shall observe any other cause of danger, they shall report the circumstance instantly to the manager, overman, or roadsman, and means shall be taken by the brushers and reddsman, in the meantime, to secure the "lipe"; but, if the accumulation of impure air shall be so considerable as to render it at all hazardous to continue brushing or building farther, until means shall have been taken to overcome and disperse the same, the brushers and reddsman shall cease work, and shall be careful not to approach with unprotected lamps the places where danger exists—nor at all unless accompanied by the fireman or roadsman.

64. In brushing and building drawing roads towards faces, brushers and reddsman are required to make their brushing and building regular and continuous, keeping pace with the progress of the miners, so that the side buildings may be carried in, and the road formed, at a convenient distance back, simultaneously with the excavation of coal or other minerals.

#### CLERKS AND OTHERS.

65. Every clerk, or other person, employed and instructed to keep any register of boys and memorandum of certificates, in terms of the statute, shall be bound to make the necessary entries, so far as materials are furnished to him for that purpose, for the use of the owner, agent, or manager.

#### DOOR-KEEPERS.

66. Every person employed in keeping a trap-door for the production or promotion of ventilation in the mine, shall, during his shift, remain continually at the post assigned him, and carefully observe the directions he receives from the manager, overman, roadsman, or fireman, as to the opening and shutting of such doors, either on the occasion of other workmen passing through the same or at the beginning or end of the shift.

## MISCELLANEOUS REGULATIONS.

67. The manager, fireman, or roadsman are authorized to examine safety lamps, in terms of general rule No. 7, without prejudice to the appointment of any other competent person for that purpose; and in this mine the word "workings," into which safety lamps may not be taken in terms of said general rules, shall include all parts of the mine (below ground) from the pit-bottom inwards.

68. If, in proceeding to their working places, or in travelling along any formed road, or other part of the works—the maintenance of which, under these regulations, devolves on the owner, agent, or manager—miners, drawers, or other workmen shall meet with or see any fall from the roofs, or shall observe any dangerous place in the roofs, walls or elsewhere in their progress, they shall not pass the same, but shall instantly report the occurrence to the manager, or roadsman, or other person known to have the maintenance of such places under his charge; and miners, drawers, and other workmen shall not return past the fall or dangerous place, until the same shall have been made secure, which it shall be imperative on the manager, overman, or other person having the charge forthwith to do.

69. As a matter of common safety, miners, drawers, and all other workers, who shall observe, or who shall come to the knowledge of, any damage to, or deficiency in, any road, roof, or air-course, or in any roof, permanent or temporary brattice, or in the shaft, buildings, cube, or other appliance or work, devised for making, maintaining, and promoting the effective ventilation of the mine, shall be bound instantly to communicate such damage or deficiency to the manager, overman, roadsman, fireman, or other person in charge, so that the same may be forthwith repaired or rectified.

70. In like manner, every miner, drawer, and other workman, who shall observe or come to know of any defect or flaw in the cage, ropes, or chains, or in any part of the engine, machinery, and gearing, used in or about the mine, whereby the sufficiency thereof may be impaired, shall be bound forthwith to communicate the same, as above.

71. No miner or other workman shall be permitted to introduce into the mine any stranger, or person employed by them, on any pretence, without the consent of the owner, agent, or manager.

72. Every miner or other person who shall be the immediate employer of any boy or male young person, shall be bound to see that such boy or young person leaves the mine when his period of work has expired.

73. Miners, drawers, and all others who shall have occasion to pass through any trap-door, shall thereupon closely shut the same, and shall on no account leave it open. On discontinuing work at the end of a shift, and especially where no work is to be done in the mine on the following day, care must be taken by every workman closely to shut all trap-doors, and thereby prevent the proper current of air necessary for ventilation from being diverted.

74. All workmen are expressly forbidden to throw into, deposit, or leave coals or other minerals, wood, stones, or rubbish, or materials of any kind, in any air-course or road, so as to interfere with, or hinder, the air passing into and through the mine.

75. All workmen are prohibited from entering or remaining in any place throughout the whole mine, where not absolutely required by duty to be at the time.

76. Miners and all others are prohibited from knowingly or wilfully defacing or removing marks which may be made in any part of the workings for the guidance of the workmen in their operations. All workers are forbidden to displace, injure, or damage in any way, the stoops, props, hutches, rails, or any part of the machinery, gearing, and apparatus.

77. Meetings of miners, and other workmen, in a body, within the workings, or in any of the roads or air-courses, or at the pithead, are strictly prohibited.

78. Workmen ascending or descending the shaft shall not be allowed to leave the cage while it is in motion, nor until it shall have rested at the landing place.

79. No workman shall be permitted to enter, or to continue in the mine, while in a state of intoxication.

80. Wherever explosive gas is known to exist, and safety lamps

are used, no person shall be allowed to smoke tobacco in such part of the mine, or to have in his possession any lucifer match or other material intended for lighting tobacco.

81. Wherever safety lamps are required, or directed to be used, no person shall use any open lamp.

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*Name of the Mine,*.....

*Name of the Owner,*.....

*Name of the Manager,*...

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*Name of Inspector,*.....

*Address,*.....

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*N.B.*—All persons employed in the mine, in whatever capacity, are specially requested to peruse the whole of these rules, under whatever head, so as to make themselves acquainted with the terms thereof; and nothing in these rules shall be construed to prevent any arrangement between miners and their employers as to payment for work done in redding “falls” in working places.

(3.)—METALLIFEROUS MINES REGULATIONS ACT  
(10TH AUGUST, 1872), 35 AND 36 VICT., CH. 77.

The General Rules are contained in section 23, quoted below.

As previously noted, in Scotland the Special Rules under the Coal Mines Act are in use with reference to other mines in Scotland.

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23. The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies :

(1.) An adequate amount of ventilation shall be constantly produced in every mine to such an extent that the shafts, winzes, sumps, levels, underground stables, and working places of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

(2.) Gunpowder or other explosive or inflammable substance shall only be used underground in the mine as follows :

(a.) It shall not be stored in the mine :

(b.) It shall not be taken into the mine, except in a case or canister containing not more than four pounds :

(c.) A workman shall not have in use at one time in any one place more than one of such cases or canisters :

(d.) In charging holes for blasting, except in mines excepted from the operation of this section by the Secretary of State, an iron or steel pricker shall not be used, and a person shall not have in his possession in the mine underground any iron or steel pricker, and an iron or steel tamping rod or stemmer shall not be used for ramming either the wadding or the first part of the tamping or stemming on the powder :

(e.) A charge of powder which has missed fire shall not be unrammed.

(3.) Every underground plane on which persons travel, which is self-acting, or worked by an engine, windlass, or gin, shall be



provided (if exceeding thirty yards in length) with some proper means of signalling between the stopping places and the ends of the plane, and shall be provided in every case, at intervals of not more than twenty yards, with sufficient man-holes for places of refuge.

(4.) Every road on which persons travel underground, where the produce of the mine in transit exceeds ten tons in any one hour over any part thereof, and where the load is drawn by a horse or other animal, shall be provided, at intervals of not more than one hundred yards, with sufficient spaces for places of refuge, each of which spaces shall be of sufficient length, and of at least three feet in width between the waggons running on the tramroad and the side of the road ; and the Secretary of State may, if he see fit, require the inspector to certify whether the produce of the mine in transit on the road aforesaid does or does not ordinarily exceed the weight as aforesaid.

(5.) Every man-hole and space for a place of refuge shall be constantly kept clear, and no person shall place anything in a man-hole or such space so as to prevent access thereto.

(6.) The top of every shaft which was opened before the commencement of the actual working for the time being of the mine and has not been used during such actual working shall, if so required in writing by the inspector of the district, be securely fenced, and the top of every other shaft which for the time being is out of use, or used only as an air shaft, shall be securely fenced.

(7.) The top and all entrances between the top and bottom of every working or pumping shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations, if proper precautions are used.

(8.) Where the natural strata are not safe, every working or pumping shaft shall be securely cased, lined, or otherwise made secure.

(9.) Where one portion of a shaft is used for the ascent and descent of persons by ladders or a man-engine, and another portion of the same shaft is used for raising the material gotten in the mine, the first-mentioned portion shall be cased or otherwise securely fenced off from the last-mentioned portion.

(10.) Every working shaft in which persons are raised shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in work between the surface and the bottom of the shaft to the surface, and from the surface to the bottom of the shaft and to every entrance for the time being in work between the surface and the bottom of the shaft.

(11.) A sufficient cover overhead shall be used when lowering or raising persons in every working shaft, except where it is worked by a windlass, or where the person is employed about the pump or some work of repair in the shaft, or where a written exemption is given by the inspector of the district.

(12.) A single linked chain shall not be used for lowering or raising persons in any working shaft or plane except for the short coupling chain attached to the cage or load.

(13.) There shall be on the drum of every machine used for lowering or raising persons such flanges or horns, and also if the drum is conical, such other appliances, as may be sufficient to prevent the rope from slipping.

(14.) There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break, and also a proper indicator (in addition to any mark on the rope) which shows to the person who works the machine the position of the cage or load in the shaft.

(15.) A ladder permanently used for the ascent or descent of persons in the mine shall not be fixed in a vertical or overhanging position, and shall be inclined at the most convenient angle which the space in which the ladder is fixed allows, and every such ladder shall have substantial platforms at intervals of not more than twenty yards.

(16.) If more than twelve persons are ordinarily employed in the mine below ground, sufficient accommodation shall be provided above ground near the principal entrance of the mine, and not in the engine-house or boiler-house, for enabling the

persons employed in the mine to conveniently dry and change their dresses.

(17.) Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and be kept securely fenced.

(18.) Every steam boiler shall be provided with a proper steam gauge and water gauge, to show respectively the pressure of steam and the height of water in the boiler, and with a proper safety valve.

(19.) No person shall wilfully damage, or without proper authority remove or render useless, any fencing, casing, lining, guide, means of signalling, signal, cover, chain, flange, horn, break, indicator, ladder, platform, steam gauge, water gauge, safety valve, or other appliance or thing provided in any mine in compliance with this Act.

Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act, and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner and agent of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

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(4.)—FACTORY AND WORKSHOP ACT, 1878, 41 AND 42  
VICT., CH. 16.

PROVISIONS AS TO SAFETY.

5. With respect to the fencing of machinery in a factory the following provisions shall have effect :—

- (1.) Every hoist or teagle near to which any person is liable to pass or to be employed, and every fly-wheel directly connected with the steam or water or other mechanical power, whether in the engine house or not, and every

part of a steam engine and water wheel, shall be securely fenced ; and

- (2.) Every wheel-race not otherwise secured shall be securely fenced close to the edge of the wheel-race ; and
- (3.) Every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced—(the expression “mill-gearing” comprehends every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process \*) ;—and
- (4.) All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process.

A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act.

6. Where an inspector considers that in a factory any part of the machinery of any kind moved by steam, water, or other mechanical power, to which the foregoing provisions of this Act with respect to the fencing of machinery do not apply, is not securely fenced, and is so dangerous as to be likely to cause bodily injury to any person employed in the factory, the following provisions shall apply to the fencing of such machinery :—

- (1.) The inspector shall serve on the occupier of the factory a notice requiring him to fence the part of the machinery which the inspector so deems to be dangerous :
- (2.) The occupier, within seven days after the receipt of the notice, may serve on the inspector a requisition to refer the matter to arbitration ; and thereupon the matter shall be referred to arbitration, and two skilled arbitrators shall be appointed, the one by the inspector and the other by the occupier ; and the provisions of the Companies Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration shall, subject to the express provisions of this section,

\* By the interpretation clause, sec. 96.

apply to the said arbitration, and the arbitrators or their umpire shall give the decision within twenty-one days after the last of the arbitrators, or, in the case of the umpire, after the umpire is appointed, or within such further time as the occupier and inspector, by writing, allow ; and if the decision is not so given the matter shall be referred to the arbitration of an umpire to be appointed by the Judge of the County Court within the jurisdiction of which the factory is situate :

- (3.) If the arbitrators or their umpire decide that it is unnecessary or impossible to fence the machinery alleged in the notice to be dangerous, the notice shall be cancelled, and the occupier shall not be required to fence in pursuance thereof, and the expenses of the arbitration shall be paid as the expenses of the inspectors under this Act :
- (4.) If the occupier does not, within the said seven days, serve on the inspector a requisition to refer the matter to arbitration, or does not appoint an arbitrator within seven days after he served that requisition, or if neither the arbitrators nor the umpire decide that it is unnecessary or impossible to fence the machinery alleged in the notice to be dangerous, the occupier shall securely fence the said machinery in accordance with the notice or with the award of the arbitrators or umpire if it modifies the notice, and the expenses of the arbitration shall be paid by the occupier, and shall be recoverable from him by the inspector in the County Court :
- (5.) Where the occupier of a factory fails to comply within a reasonable time with the requirements of this section as to securely fencing the said machinery in accordance with the notice or award, or fails to keep the said machinery securely fenced in accordance therewith, or fails constantly to maintain such fencing in an efficient state while the machinery required to be fenced is in motion for the purpose of any manufacturing process, the factory shall be deemed not to be kept in conformity with this Act :



- (6.) For the purpose of this section and of any provisions of this Act relating thereto, "machinery" shall be deemed to include any driving strap or band.

7. Where an inspector considers that in a factory or workshop a vat, pan, or other structure, which is used in the process or handicraft carried on in such factory or workshop, and near to or over which children or young persons are liable to pass or to be employed, is so dangerous, by reason of its being filled with hot liquid or molten metal or otherwise, as to be likely to be a cause of bodily injury to any child or young person employed in the factory or workshop, he shall serve on the occupier of the factory or workshop a notice requiring him to fence such vat, pan, or other structure.

The provisions of this Act with respect to the fencing of machinery which an inspector considers not to be securely fenced and to be dangerous shall apply in like manner as if they were re-enacted in this section, with the substitution of the vat, pan, or other structure, for machinery, and with the addition of workshop, and if the occupier of a factory or workshop fails constantly to maintain the fencing required under this section in an efficient state, while such vat, pan, or other structure is so filled or otherwise dangerous as aforesaid, the factory or workshop shall be deemed not to be kept in conformity with this Act.

8. Where an inspector observes in a factory that any grindstone, worked by steam, water, or other mechanical power, is in itself so faulty, or is fixed in so faulty a manner as to be likely to cause bodily injury to the grinder using the same, he shall serve on the occupier of the factory a notice requiring him to replace such faulty grindstone, or to properly fix the grindstone fixed in the faulty manner.

The provisions of this Act with respect to the fencing of machinery which an inspector considers not to be securely fenced and to be dangerous shall apply in like manner as if they were re-enacted in this section with the necessary modifications.

Where the occupier of a factory fails to keep the grindstone mentioned in the notice or award in such a state and fixed in such manner as not to be dangerous, the factory shall be deemed not to be kept in conformity with this Act.

9. A child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power.

A young person or woman shall not be allowed to clean such part of the machinery in a factory as is mill-gearing while the same is in motion for the purpose of propelling any part of the manufacturing machinery.

A child, young person, or woman shall not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or other mechanical power.

A child, young person, or woman allowed to clean or to work in contravention of this section shall be deemed to be employed contrary to the provisions of this Act.

#### PROVISIONS FOR HEALTH IN CERTAIN FACTORIES AND WORKSHOPS.

33. For the purpose of securing the observance of the requirements of this Act as to cleanliness in every factory and workshop, all the inside walls of the rooms of a factory or workshop, and all the ceilings or tops of such rooms (whether such walls ceilings, or tops be plastered or not), and all the passages and staircases of a factory or workshop, if they have not been painted with oil or varnished once at least within seven years, shall be limewashed once at least within every fourteen months, to date from the period when last limewashed; and if they have been so painted or varnished shall be washed with hot water and soap once at least within every fourteen months, to date from the period when last washed.

A factory or workshop in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act.

Where it appears to a Secretary of State that in any class of factories or workshops, or parts thereof, the regulations in this section are not required for the purpose of securing therein the observance of the requirements of this Act as to cleanliness, or are by reason of special circumstances inapplicable, he may, if he

thinks fit, by order made under this part of this Act, grant to such class of factories or workshops, or parts thereof, a special exception that the regulations in this section shall not apply thereto.

34. Where a bakehouse is situate in any city, town, or place containing, according to the last published Census for the time being, a population of more than five thousand persons, all the inside walls of the rooms of such bakehouse, and all the ceilings or tops of such rooms (whether such walls, ceilings, or tops be plastered or not), and all the passages and staircases of such bakehouse shall either be painted with oil or varnished or be limewashed, or be partly painted or varnished and partly limewashed ; where painted with oil or varnished there shall be three coats of paint or varnish, and the paint or varnish shall be renewed once at least in every seven years, and shall be washed with hot water and soap once at least in every six months ; where limewashed the limewashing shall be renewed once at least in every six months.

A bakehouse in which there is any contravention of this section shall be deemed not to be kept in conformity with this Act.

35. Where a bakehouse is situate in any city, town, or place containing, according to the last published Census for the time being, a population of more than five thousand persons, a place on the same level with the bakehouse, and forming part of the same building, shall not be used as a sleeping place, unless it is constructed as follows ; that is to say,

unless it is effectually separated from the bakehouse by a partition extending from the floor to the ceiling ; and

unless there be an external glazed window of at least nine superficial feet in area, of which at the least four and a half superficial feet are made to open for ventilation.

Any person who lets or occupies or continues to let or knowingly suffers to be occupied any place contrary to this section shall be liable to a fine not exceeding, for the first offence, twenty shillings, and for every subsequent offence five pounds.

36. If in a factory or workshop where grinding, glazing, or polishing on a wheel, or any process is carried on by which dust is generated and inhaled by the workers to an injurious extent,

it appears to an inspector that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may direct a fan or other mechanical means of a proper construction for preventing such inhalation to be provided within a reasonable time ; and if the same is not provided, maintained, and used, the factory or workshop shall be deemed not to be kept in conformity with this Act.

37. A child, young person, or woman shall not be employed in any part of a factory in which wet-spinning is carried on, unless sufficient means be employed and continued for protecting the workers from being wetted, and, where hot water is used, for preventing the escape of steam into the room occupied by the workers.

A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act.

## 5.—COUNTY COURT RULES.

### ORDER XLIV.

#### THE EMPLOYERS' LIABILITY ACT, 1880.

##### *Service of Summons.*

1. A summons in an action brought under the provisions of the Employers' Liability Act, 1880, where it is to be served in the home district, should in order to ensure its service be delivered to the bailiff thirty-two clear days at least, and where it is to be served in a foreign district, thirty-five clear days before the return day, but it shall in either case be served thirty clear days before the return day thereof.

2. Particulars of demand shall be filed by the plaintiff at the time of the entry of the plaintiff, whatever the amount claimed may be ; and a copy thereof shall be forthwith sent to the Judge.

3. The particulars of demand shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed, and where the action is brought by more than one plaintiff, the amount of compensation claimed by each plaintiff, and where the injury of which the

plaintiff complains shall have arisen by reason of the act or omission of any person in the service of the defendant, the particulars shall give the name and description of such person.

*Jury.*

4. Notice of a demand for a jury shall be given in writing to the registrar of the Court fifteen clear days at least before the return day, and the summonses to the intended jurors shall be delivered to the bailiff forthwith.

*Assessors.*

5. Any person who shall, as hereinafter provided, be appointed by the Judge to act as an assessor in the action, shall be qualified so to act.

6. Where no demand for a jury shall have been made, a party who desires assessors to be appointed shall, ten clear days at least before the return day, file an application according to the form in the Appendix stating the number of assessors he proposes to be appointed, and the names, addresses, and occupations of the persons who may have expressed their willingness in writing to act as assessors. If the applicant has obtained the consent of the other party to the persons named being appointed, he shall file such consent with his application.

7. Where the application for the appointment of assessors has been made by only one party to an action, the registrar shall forward a copy of the application so made to the other party, who may then either file an application for assessors, or file objections to one or more of the persons proposed.

8. Where separate applications are filed by the parties, no objection to the persons proposed shall be made by either party, but the Judge may appoint from the persons named in each application one or more assessors, provided that the same number of assessors be appointed from the names given in such applications respectively.

9. The applications for the appointment of assessors, together with any objections made to the persons proposed, shall be forwarded by the registrar to the Judge.

10. Where the Judge shall grant the application for the



appointment of assessors he shall appoint such of the persons proposed for assessors as he may think fit, subject to the provisions contained in this order.

11. In any action where no demand for a jury has been made, and an application for the appointment of assessors has been filed, the Judge may, either before or at the return day, nominate one or more additional persons to act as assessor or assessors in the action. Where no application for assessors has been made, the Judge may, if he think fit, appoint any one or more persons to act as assessors in the action before or at the return day.

12. If at the time and place appointed for the trial all or any of the assessors appointed shall not attend, the Judge may either proceed to try the action with the assistance of such of the assessors, if any, as shall attend, or he may adjourn the trial generally, or upon any terms which he may think fit, or he may appoint any person who may be available and who is willing to act, and who is not objected to, or who if objected to is objected to on some insufficient ground, or the Judge may try the action without assessors if he shall think fit.

13. Every person nominated as an assessor shall receive for each day's attendance in every action the sum of two guineas, together with such further sum, if any, for his expenses as the Judge may order.

14. Every person requiring the Judge to be assisted by assessors shall at the time of filing his application deposit with the registrar the sum of two guineas for each assessor proposed, and such payment shall be considered as costs in the action, unless otherwise ordered by the Judge. Provided that where a person proposed as an assessor shall have in writing informed the registrar that he does not require his remuneration to be so deposited, no deposit in respect of such person shall be required.

15. Where an action shall be tried by the Judge with the assistance of any assessors in addition to or independently of any assessors proposed by the parties the remuneration of such assessors shall be borne by the parties, or either of them, as the Judge shall direct.

16. If after an assessor has been appointed the action shall not be tried, the Judge shall have power to make an allowance

to him in respect of any expense or trouble which he may have incurred by reason of his appointment, and direct the payment to be made out of the sum deposited for his remuneration.

17. The assessors shall sit in Court with the Judge, and assist him when required with their opinion and special knowledge for the purpose of ascertaining the amount of compensation, if any, which the plaintiff is entitled to recover.

*Judgment where several plaintiffs.*

18. Where two or more persons are joined as plaintiffs under Order III., Rule 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages and the costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the Court may think fit.

19. Should the defendant fail to pay the several amounts of compensation and the costs awarded in the action, execution against his goods may issue as in an ordinary action, and should the proceeds of the execution be insufficient, after deducting all costs, to pay the whole of the amounts awarded, a dividend shall be paid to each plaintiff, calculated upon the proportion of the amount which shall have been awarded to the respective plaintiffs to the total amount realised after the deduction of all the costs of the action as aforesaid.

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ORDER III. *referred to in 18 supra.*

PARTIES.

*Generally.*

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to any extra costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

## APPENDIX (B) TO PART V.

1. Digest of evidence led before Committee with reference to the question of whether contracting out of the Act should be permitted.
2. Letter from Mr. Pickard which appeared in the "Wigan Observer" in October, 1880, and which led to an arrangement being made as to contracting out of the Act between a large number of colliery proprietors in Lancashire and their workmen.
3. Report by M. Treitt as regards France on "Legislation and questions with reference to the responsibility of employers towards their workmen in cases of accidents."
4. Similar report as regards Germany by Mr. Leveson-Gower.
5. Terms of the proposed National Workmen's Pension Act for Italy.
6. Proposed additional clauses to Employers' Liability Act, 1880, handed to the Committee by Mr. Sheriff Lees.

(1) A large amount of evidence was led before the recent Committee on the part of those who were opposed to its being permitted to allow any contracting out of the amending Act, as well as of those who took the view that the contributions by masters to benefit societies should in certain cases be allowed to furnish a valid reason for permitting contracting out of the Act. As explained in the text, no countenance was afforded either by the members of Committee or by the evidence led that masters should have the power of refusing to give employment unless the workman agreed to contract out of the Act without a fair *quid pro quo* being given by the master for the workman's consent. I propose to give here a sort of digest of the evidence on this matter. I at one time intended to give, and had indeed prepared for publication much of the evidence *quoad* this *verbatim*,

but I found it would take up too much space to give all the evidence on this matter. I intend to give the evidence of some of the leading witnesses on this point at length, extracts from that of others, as also to give references to other corroborative witnesses identifying their evidence by references to the numbers of the questions in the Blue-Book, so that those interested may be able to refer to it for themselves. I may explain that there is no digest of the evidence in the Blue-Book referred to.

It will, I think, be convenient to classify the evidence led in three divisions—(1) As to coal and other mines and iron industries ; (2) building and other trades ; (3) railways. The evidence as to these I take up in their order.

(1) *Coal and other Mines and Iron Industries.*

A great amount of evidence was led as to the advantages and disadvantages of contracting out.

AGAINST CONTRACTING OUT.

The first witness examined before the Committee was Mr. Samuel Woods, agent for the Ashton and Maydock Miners' Trades Union. He has been a miners' agent for many years ; that is to say, according to his own definition, a person appointed by the miners themselves to look after their general interests. From his evidence, strongly opposed to permitting masters to contract out, I extract the following passages :—

“ 11. Do you remember the Employers' Liability Act of 1880 being passed ?—Yes.

“ 12. Was any action taken immediately after its passing, so far as the miners are concerned in South-West Lancashire, by the employers ?—Yes ; the employers immediately after the Act was passed took means to coerce their men out of the benefits of the Act, which at that time led to a great strike in Lancashire. At the commencement of 1881 there was a strike of, I should think, 60,000 nearly on that account.

“ 13. How many men, do you know, were, as you say, coerced to contract out of the Act in South-West Lancashire ?—As near as I can say, between 28,000 and 30,000.

"14. How do you get at those figures?—We take the inspectors' returns for South-West Lancashire, and with the exception of one company, as far as I know, that is Colonel Blundell, the rest of West Lancashire are contracted out of the Act.

"49. From 1880 till now, what has been the feeling of the South-West Lancashire miners with reference to contracting out of the Act?—It has been a feeling of almost unanimous dissatisfaction.

"50. Have many meetings been held on the subject?—Yes; hundreds of meetings.

"51. How many, if any, have you attended since 1880?—I should think, at a rough guess, I have addressed nearly 200 meetings.

"52. Have the majority at the bulk of those meetings been against being compelled to contract out of the Act?—There never has been an amendment, to my knowledge, proposed against the resolution expressing dissatisfaction with the present system.

"53. Have any of those meetings been very large?—Yes.

"54. How numerous?—They varied, of course; perhaps from 50 up to 5,000.

"55. That is depending on the district in which you were holding your meeting?—Yes; and in other parts of Lancashire as well. I have addressed meetings all over Lancashire.

"56. Then do I understand you rightly that resolutions condemning their being compelled to contract out of the Act have been passed at all these meetings?—Yes.

"57. Can you tell the Committee whether the feeling on the part of the men of hostility at being compelled to contract out of the Act is simply on the question of compensation, or whether any other feeling animates them?—It is not so much with regard to the compensation, but the hostility of feeling is with regard to the less amount of safety that is provided under the present system, compared with what could be provided if they had the benefits of the Employers' Liability Act.

"58. The view of your men, rightly or wrongly, is that the enforcement of the Employers' Liability Act compels greater care for life and limb of the workers?—That is so."



Another important witness was Mr. Edward Cowey, the president of the Yorkshire Miners' Association, who spoke on behalf of 60,000 miners. I excerpt the following questions and answers from the report of his examination :—

“1030. What is the general feeling of the men, as far as you know it, in South-West Yorkshire as to contracting out of the Act ?—There is a decided objection to contracting out of the Act by miners in South-West Yorkshire.

“1031. Has that decided objection to contracting out of the Act been very strongly expressed at the great annual meetings you hold ?—At every annual meeting and at periodical meetings likewise.

“1032. The annual meetings are attended by a very large number of the miners, are they not ?—From 30,000 to 40,000 attend them.

“1033. And is there practical unanimity at those meetings against contracting out of the Act ?—We have never had a single vote against the resolution.

“1034. And it has been raised at each of the meetings ?—At each meeting.

“1035. What are the reasons the men have for desiring that there shall be no contracting out of the Act ?—Their reason principally is this, that they think it folly for an Act of Parliament to be passed for their protection and then to contract away from it. Again, they likewise think that it is a deterrent on the colliery owner for their safety.

“1036. They think that the Employers' Liability Act insures greater safety for the workmen ?—I do not think that at any meeting I have attended at any time have I heard an opinion expressed regarding compensation ; we have never discussed the point on compensation ; it is a matter of increased safety.

“1037. That is, that the men whom you represent regard the question of safety of life and limb, rather than the question of compensation ?—Much more so.”

Evidence to the like effect was given by the following witnesses :—

Mr. William Hammond Paterson, financial secretary of the

Durham Miners' Association, representing some 50,000 men. Questions 1440-1446.

Mr. Daniel Reid, joint-secretary of the Permanent Relief Fund for the Northumberland and Durham Miners. Membership, 86,866. Q. 1572-1582 inclusive.

Mr. John Nixon, president of the Northumberland Miners' Mutual Confident Association. Membership, 13,000 to 14,000. Q. 1942-44 and 1969-70.

Mr. Joseph Toyn, president and agent for the North Yorkshire and Cleveland Miners' Association, speaking for a district of between 6,000 and 7,000 ironstone miners. Q. 2197-2205.

These were, I think, the most important witnesses representing the large number of miners opposed to permitting any contracting out of the Act. Taking up an intermediate position as between those opposed to contracting out and those in favour of it in certain circumstances was Mr. George Lamb Campbell, secretary of the Central Association for dealing with distress caused by mining accidents. Total membership in 1885 appears to have been over 209,000. "There are differences of opinion amongst the members of the societies which form the Central Association, and a position of neutrality has always been maintained by it." Practically, his evidence came to this, that the Association he represented, being made up of men who took different views as to the advisability of giving or withholding the right of contracting out, he, as representing the Association of which he was secretary, declined to express any opinion as to whether the power to contract out was advisable or the reverse.

#### IN FAVOUR OF CONTRACTING OUT.

Mr. Alfred Hewlett, a coalowner and ironmaster, and the managing director of the Wigan Coal and Iron Company, employing somewhere about 10,000 men, was examined. He, as one of the vice-presidents of the Lancashire and Cheshire Miners' Permanent Relief Society, which was established in 1872, and which had therefore nothing whatever to do in its origin with the Employers' Liability Act, gave an interesting account of how after its passing an arrangement was come to between masters and men, whereby, in consequence of the em-

ployers undertaking to pay a quarter of the whole contributions paid into a relief fund by masters and men jointly, employers and employed agreed to contract out of the Act. I take the following excerpt from the report of his examination :—

“3744. Then it was found, was it not, that even with the increased contribution fixed at 10 per cent. from the coalowners, these societies were not in a sound financial condition?—This was so.

“3745. And it was thereupon resolved, was it not, that the contribution from the mineowners should be increased to 15 per cent. upon the men’s contributions?—That was so.

“3746. Then the arrangement based upon this increased contribution from the mineowners continued in force, did it not, until the passing of the Employers’ Liability Act in 1880?—That was so. I ought to say this : that at the same time that the employers agreed to raise their contribution to 15 per cent., the men also agreed to raise their payment to 4d. and 2d. respectively.

“3747. Then after the passing of the Act the position was reconsidered, was it not?—It was.

“3748. What arrangements were entered into generally ; you need not go into it in much detail?—If you will allow me I will put in a statement showing how it was led up to (*handing in the same*) ; but I can summarise it very shortly.

“3749. Will you give, briefly, the effect of it?—It shortly arose in this way : a suggestion was made by one of the representatives of the colliers, Mr. Pickard, that it was a pity that litigation and difficulties should arise under the Act, and that it would be much better to see whether a mutual understanding could not be come to, whereby the relief society might be made the basis for working out the Act ; and ultimately the arrangement made was that the employers should pay in the whole 25 per cent., and that the men should receive 10s. per week instead of 8s. as before ; and that there should be no action taken under the Employers’ Liability Act ; in other words, that arrangement was made in view of the Act, and the increased payments to the men were their satisfaction in respect of the Employers’ Liability Act. That is shortly the history of it.

"3750. And this arrangement has been accepted, has it not, by the great bulk of the men employed in the Lancashire coal mines?—That is so; by very far the largest number of men are working under it at the present moment.

"3751. I believe we have had the figures from the previous witness, Mr. Campbell?—That is so.

"3752. Would you give us your view of the present arrangement. You consider, do you not, that it has been most beneficial?—Yes.

"3753. Will you give us generally your view as to the desirability of maintaining the law as at present, and also with reference to changes that have been proposed in the Bills which are before us?—I think first of all that the Act should be made permanent; next, I think it would be very undesirable indeed to take away the power of arrangement in view of the Act, such as exists in our own district. I am quite clear that that arrangement has been the greatest possible benefit to the workmen employed in our district; indeed, I think it would be nothing short of a calamity to the district if the arrangement which now subsists were done away with. The men have a larger allowance in the way of weekly pay than in any other district with which I am acquainted; in most cases it is a payment of 8s. per week; in our case it is 10s., and the last 2s. just makes all the difference in the income, for comfort or discomfort of living, when the bread-winner is unfortunately laid off his work. I look with the greatest possible pride on our having that arrangement in the district; and it must be borne in mind that comparatively few of the accidents which happen would really fall under the Employers' Liability Act. That, I think, is established very clearly by the figures named just now by Mr. Campbell as to the total number of claims made in all trades during the last few years; and you see that men now get this 10s. a week, not for cases only in which they would be entitled to receive it under the Employers' Liability Act, but they get it in every case. I look upon it also as the greatest possible benefit to avoid litigation. There would have been constant heart-burning and constant fighting if we had taken the other course, and had we had nothing more to do with the permanent relief society, and had we saved our

money to litigate the cases that might arise under the Act there would have been no end of suffering ; the men would have been far worse off, and there would not have been anything like the same good feeling that I am happy to say and think now exists. On all these grounds I should be sorry to see taken away the power of what, I think, has been unfortunately called contracting out of the Act. I think it is making an arrangement in view of the Act, and I think that in our case it has been a beneficial arrangement in view of the Act.

“3754. From what you have said, may I gather that, even though the men were not under any obligation with regard to resigning their claims under the Act, still the liability of the employers under the Act to make payments would not amount to any very considerable sum?—I think they would not ; but there is always this to be said : there is the possibility of a large accident happening to a colliery, and there is the possibility of its being traced to negligence, and in that case of course it would come to an enormous sum of money upon the coalowners ; that was one of the cases which we took into consideration in coming to the arrangement ; but taking the whole of the kingdom in all trades, and having reviewed also the other districts in which such an arrangement as ours has not taken force, it would not appear that a great many of the accidents would have fallen under the Employers’ Liability Act ; therefore I think it is that the men get such a very substantial benefit in the arrangement.”

Mr. Pickard was referred to in Mr. Hewlett’s evidence. While Mr. Hewlett, it might be said, spoke from the masters’ point of view, the same thing cannot be said of Mr. Pickard. The latter was one of the most important witnesses examined, from his representative position and from the intelligent interest which he has for many years taken in all subjects connected with the wellbeing of workmen, and more especially of miners. He has long been a miners’ agent, and at the time he gave his evidence was, and, I presume, still is President of the Lancashire Miners’ Federation. After referring to the evidence as to the establishment of a benefit society in Lancashire, which was mainly brought about through Mr. Pickard’s advice and authority, the Chairman said—



"Would you tell the Committee, shortly, what are your views with reference to the Bills which have been referred to the consideration of this Committee, and what are the points embraced in those Bills to which you take exception," to which the reply was—"In my opinion the Bills want amending as brought in by the two honourable members of the House, Mr. Burt and Mr. O'Connor ; that where the employer makes it a condition of employment that the workman is to contract out of the Act he should not have the right to do so ; but where employers and workmen jointly and mutually say, 'We will pay so much,' and the employers say, 'We will give you a fourth or a fifth or a sixth of it,' I have an opinion that those workmen and employers should be exempted from being compelled to take the Act." And the examination thus proceeded—

"4665. It would depend upon the consideration that was given to the workman, whether or not you would allow him to contract himself out of the Act ?—Yes ; and I would say that that consideration should not be less than 25 per cent. and as high as you like beyond.

"4666. That is the main point which you want to put before us with your great authority, as knowing the views of the workmen ?—Yes."

Thereafter the witness stated that in 90 per cent. of the collieries of the Wigan district, where he is the miners' representative, there had been adhesion to the permanent relief societies, inferring contracting out on their part, and the following passages from Mr. Pickard's evidence are a very important contribution to the determination of the point under discussion. His evidence appears to me extremely valuable, as that of a man wholly interested in the well-being of the workmen, and yet taking a broad and liberal view of the relations between employer and employed, and the best means of insuring mutual respect, forbearance, and good feeling between masters and men.

"4694. Have you any other remark you wish to make ?—Having been interested now in those questions for so many years, having been more than 22 years a miners' agent, and more than 40 years in connection with mines, I should like to say, about a statement

given in evidence here, that I was very anxious to put that statement right if I got the privilege. A statement was made that since the men have been compelled to contract from under the Act our fatalities have been greater. Now, I find by examining the returns of South Lancashire alone that we have 561 from 1875 to 1879 ; and from 1880, since the Act came into operation, to 1884 we had 377 ; making a decrease, since we were under the arrangement, in Lancashire of 184 fatalities.

"4695. Mr. A. O'Connor—You are including 1880 there in the wrong list ; the Act was not in force in 1880 ?—I am taking the years as the inspector has given it.

"4696. Mr. Jackson—Four years in each case ?—Yes.

"4697. Mr. Tomlinson—Then it is not your view that the Act has contributed to the more safe working of the mines in Lancashire ?—No ; if I had thought that, in the position I have stood in for so many years, I should have been very sorry to have lifted my voice for the men not to be under the protection of the Act ; but, believing from observation and experience that it was not so, I examined the Blue-Books, and the results are those which I have given you.

"4698. And you believe that the employers are as anxious as they can be to secure their men working in safety ?—I would be very sorry to think otherwise ; and as one of the witnesses has said, I believe that the Employers' Liability Act is not a question of safety. If I want safety I go to the 1872 Act of Parliament, the Mines Regulation Act. I had much to do with the drawing up of that Act. We tried to get the best Bill that we could, and I look for safety of both life and limb from that Act ; and whatever its deficiencies were, we contemplated having the necessary amendments by a Bill being again introduced by the Home Secretary to amend it for the future.

"4699. Colonel Blundell—You say that you approve of men being permitted to contract out of the Act, provided they are not compelled to do so ?—Yes.

"4700. But I want to know how you would propose that they should make their option, by the desire of the body of the men employed or by that of each individual, because it has been represented to me that there is a difficulty about that, and that

a pit's company ought to be one way or the other ; that at a colliery either the men should be out or they should be in ?—I quite admit that previous to the permanent relief society being established, or the Employers' Liability Act coming into operation, my experience for the last 35 years is that it was generally the condition of things that all men were expected to contribute to what we called then a pit club, from which a man received a small consideration ; and it is a difficult matter to deal with unless you deal with it in a pit set form. Still I believe there are some cases now ; I might take your own colliery to-day ; I believe that you have some working out of the arrangement, and some working in the arrangement.

“4701. Yes ; but still there is an inconvenience about it ?—I quite admit that ; I think it is better if you can have it in the pit set form.

“4702. You think that it should rest with a pit's company, and be decided by a majority one way, and that that should be the rule of the pit ?—Supposing I, as an individual, am satisfied with your employment, and wish to have the benefit of the Act, it seems rather hard that I should be coerced to go elsewhere ; supposing I were satisfied with my work, I should like to stay : it is rather delicate ground ; I should not like to be dealt with on that principle.

“4703. If the Act was made compulsory, would the permanent relief society in the Wigan district continue ?—I am afraid we should have great difficulty to continue, because of the discontinuance of the contributions of the employers ; that is not the only thing, but there is the social feeling that goes with it ; if there were no other incentive for me, in the position I am placed in betwixt the employers and the employed, but the good mutual feeling that exists betwixt employer and employed, and having found the benefit of it in my position, even on that ground alone I should be sorry for the arrangement not to be continued.

“4710. Do you understand the system in South Wales ?—Yes, a little.

“4711. Do you think it could be worked in Lancashire ?—If they can work it in South Wales we can work it in Lancashire, and I wish that there should be freedom of consideration. Both

yourself and Colonel Blundell have brought no pressure to bear, and I should wish that to go right through the district. If a man thinks proper to be in, let him be so, and if he will not, let him have the facilities of the Act.

“4712. Mr. Ainslie—I wish to know your opinion particularly on this point. Are the men so far parties to all the arrangements made, that the coercion so called, under which they have to assent to contracting out of the Act, is as much the act of the men as of the employers?—In some cases it is the act of the men ; in the majority of cases it is the act of the men. In other cases there has been coercive dealing, and I strongly protested against it from the first. I fought very hard to get this mutual arrangement. I saw the possibility of the employers going in for a sort of defence fund, and I did not wish anything of that sort to spring up ; and when the Employers' Liability Act was before us, after opposing the views of those who wanted not to have any amendment in the Bill, I suggested this, that we should come to a mutual arrangement betwixt employer and employed.

“4713. Mr. Hingley—And not to allow insurance?—Not to allow insurance. That was my wish.”

The following are witnesses generally corroborative of the views set forth by Mr. Pickard :—

Mr. Nathaniel Robt. Griffiths, mining engineer, and chairman of the Board of Management of the North Wales Miners' Permanent Relief Society. Q. 3833-3841, also 3846.

John Jones and Evan Davies, working men referred to by Mr Griffiths. Q. 3850-3859, and 3918-3922.

Henry Thomas, a collier when he gave evidence, but who had been for four years a miners' agent, gave details as to arrangements between mineowners and their employés in South Wales and Monmouthshire. Under that arrangement the masters contribute 25 per cent. of the total contribution of masters and men to a benefit fund. The men are not forced to contribute—no pressure is put on them in any way—but those who do contribute give up their rights under the Act. Those who do not are able to take advantage of the provisions of the Act. The same

witness stated that he was not aware of any case where a man who had declined to accede to the arrangement, and who had been injured, had been able to claim under the Act. See also in this witness's evidence, Q. 3974-3988, and 3995-3997.

Mr. George W. Wilkinson, the manager of several large collieries in South Wales, and a member of the Board of Management of the Monmouthshire and South Wales Miners' Permanent Provident Society, also gave evidence in favour of contracting out. He spoke, however, of the divided opinion of the men in the district with which he had to do. The estimate was that about a half were in favour of contracting out, and the other half of the men were of a different way of thinking. Q. 4090.

Morgan Dyer, a check weighman in the Ferndale Collieries, Glamorganshire. Q. 4151-4155.

Thomas Kale, with Messrs. Charlesworth, colliery owners in the West of Yorkshire, spoke as to the adoption of a mutual relief fund in three of the collieries of the Messrs. Charlesworth. To this fund the owners subscribed 25 per cent. of the total contributions. In answer to the question as to how the Society came to be formed the following answer was given:—  
 “It was formed just after the passing of the Employers' Liability Act of 1880. Mr. Charlesworth sent for a deputation of the men, and he informed them of the Act that had just passed, and told them that the Act had passed, and likewise that there were provisions in the Act for contracting out; and he also asked the deputation to convey his views to the other miners; and they went and conveyed the masters' views to the other miners, and it resulted then in the miners themselves appointing about a dozen of the most competent to investigate the provisions of the Act; and these men not being unanimous in their opinions, they put to a vote, and the men voted upon the subject themselves, and there was a majority of 158 for this mutual fund.” Q. 4370.

It was further stated by this witness that while the institution of this fund, with the consequent contracting out of the Act, was carried by the comparatively small majority of 158, the almost unanimous opinion of the men at the present time was in favour of the arrangement. Then as regards the argument that safety



requires the masters should not be allowed to contract out of the Act, the following excerpt is interesting :—

“4426. Sir Joseph Pease—There is a strong opinion in Durham, it has been given in evidence here, against contracting out of the Act, that the men think they are much safer if the masters are not allowed to contract out of the Act ; have you any view on that point ?—As far as I am concerned as a miner, and as far as my acquaintance with the Employers’ Liability Act goes, the great reformer of mines is the Mines Regulation Act itself.

“4427. They think that if publicity is given to cases of carelessness by prosecutions under the Act, the masters are then more careful ; that they dislike publicity of carelessness, that that has a greater hold on them than any money out of pocket ; what do you say to that ?—From the cases I have cited, it has come under my own observation that even the masters themselves have taken legal proceedings against the men for not being more careful.

“4428. And you do not think that fear of exposure has a strong power to make them careful ?—As far as the firm that I work with are concerned I do not think so.

“4429. You think it a well-regulated colliery ?—Exceedingly well-regulated.

“4430. And you think that where there is a well-regulated colliery men are getting better terms in contracting out of the Act than in remaining under it ?—Immensely so, in our case.”

James Hatfield, also a collier with Messrs. Charlesworth, gave evidence much to the same effect. The following extract from his evidence is interesting, as showing how well qualified the workmen themselves are to weigh the advantages and disadvantages of the mutual arrangement system spoken of :

“4496. Mr. A. O’Connor—The Committee would be perfectly ready to hear you say anything that you think is material ?—One reason for wishing this fund to continue is this : They have had a bonus in the last colliery you have heard about, but we have saved our funds, and we have established a fund of £890 since it commenced. Our rules too are rather different ; we have a rule that when a man becomes old and infirm he shall have paid to

him 8s. a week out of the fund, and we want to preserve that fund for that purpose. It is also a rule with us that when he is dead, if his widow survives him, she shall have 4s. per week as long as she lives, and we are very anxious to keep that fund for that purpose; £890, at 4 per cent., I think will bring us in £36 a year. The employers' contribution to that amount was £68 8s. during the last year, and that would keep five aged men at 8s. a week, and we are very anxious to retain that fund on that ground. We want to have a fund so that when a man has done with work he need not have to go to the workhouse or fall on the union.

"4497. Chairman—Are you apprehensive that if the workmen are not allowed to contract themselves out of the Act you will lose these benefits?—If a man loses our place he can still remain in the fund; the only difference is that Messrs. Charlesworth do not contribute their 25 per cent. to his payment, of course; he works at another place, and we simply receive his payment, but the owners do not pay 25 per cent. on the payment of a man who works at another colliery.

"4498. These benefits you spoke of are, of course, very valuable to the workmen?—Yes, they are.

"4499. Why do you suppose that the Bills which are before this Committee would deprive the workmen of those benefits?—I think that if you made the Act absolute, it is quite probable that Messrs. Charlesworth would not longer contribute their 25 per cent. to that fund, and that would make a material difference to us.

"4500. That is the ground of your objection?—Yes, it is."

Mr. Edward Fisher Smith, the principal agent for the Earl of Dudley, who is a large proprietor of collieries in South Staffordshire and East Worcestershire, stated that when the Employers' Liability Act came into force there had been a system enforced from time immemorial for giving compensation and allowances for all accidents which the workmen met with in the course of their employment. Under the system in force so long as a man was disabled he got an allowance of 6s. a week from the employer on the east side of Dudley; on the west side of Dudley 6s. a week

for a twelvemonth, and 3s. per week thereafter so long as disablement continued. This difference, the witness explained, was owing to the fact that the system on the east side had not been in existence so long. They also got medical attendance, coals, etc., free of cost.

It appears that when the Act came into force Mr. Smith took some steps, inferring that the employer was prepared to come under the Act and to discontinue the system under which they had been working. The men thereupon became alarmed and "came to me in a body and begged that I would not disturb the arrangement under which they were employed then, and there was not one who wished it to be otherwise." The question was put to this witness, 5308, "Is it not a fact that it would be to the benefit of the employer to discontinue the system?" To which the answer was, "Our iron-works are under the Act, not contracted out, and we have never had a claim of any kind; we have had very few accidents altogether. Therefore, if we had gone on equally successfully with the mines, all this money that we have paid would have been saved." It was further explained that by far the greater number of accidents in the Black Country and coal district in question arose from causes not within the control of the employer, the result accordingly being that there was a universal opinion among the men in favour of the existing arrangement rather than to have possible claims based on the illegality of contracting out of the Statute. As evidencing the immense field of labour embraced it was stated that £200,000 per annum was paid in wages and, exclusive of coal allowances, which were very considerable, £1,500 per annum was contributed by the employers to the fund.

Mr. William Simons, as solicitor for the colliery owners of Monmouthshire, South Wales, and also as solicitor for the Miners' Provident Society, stated that the Society referred to had been established at seventy-two collieries in the district, where between 47,000 and 48,000 were employed: of these 36,281 had joined the Society. The masters in this case contributed one-fourth of the annual contributions. In return for this those men who contributed to the Society discharged any right of action they might otherwise have had for personal injuries

against the masters. The following questions and answers show the position taken up by Mr. Simons and those whom he represented. Mr. Simons had himself been a colliery owner :—

“5486. Speaking for yourself, as having been a colliery owner, and as representing colliery owners, are you of opinion that if contracting out of the Act were forbidden all the contributions that you have spoken of would be withdrawn?—I think that they would be withdrawn; I know that they would from many of the owners; I know that from the owners themselves.

“5487. But shall I be right in putting it to you that your view would not be that a man should be allowed to contract out of the Act without having some reasonable consideration and advantage for such contract?—I think it entirely unreasonable that he should be required to contract out of the Act without having ample consideration for doing it.

“5488. And you would also think it unreasonable that if he chose to work as he does in many of your pits, he should be compelled to enter into one bargain if he preferred preserving his legal rights?—I think that that is entirely inexpedient, contrary to the policy of the Act.

“5489. So that on the one hand you would desire to preserve the rights of the man to the Act, if he wished; and on the other hand to preserve to employer and employed an opportunity of entering into a contract, which you suggest is better for the men and reasonable for both?—Exactly so; I may mention upon that that the object of the employers in our district was to establish a society, by means of which the workmen should ensure a much larger advantage than it was at all probable (far beyond the probability of anything) they would get by enforcing the Act. To maintain good relations with their workmen was the object.”

The evidence of Mr. Archibald Hood was referred to in the text. He is manager of a large company in South Wales. He had offered to his men on the passing of the Act to contribute twenty-five per cent. of annual contributions to a benefit fund to be established to meet the case of all accidents on condition of their contracting out of the Act. The men declined, and Mr. Hood stated that not a single claim under the Act had been preferred.

I have given above what I think is a fair *résumé* of the evidence in connection with coal and iron pits on the subject of contracting out of the Act. Passing now to other iron industries, I may in the first place refer to the evidence of Mr. Robinson, the chairman of Sharp, Stewart & Co., Limited, engineers in Manchester. This firm employs 1,400 hands. He is also chairman of the Parliamentary Committee of the iron trades, representing the employment of some 50,000 men spreading over eighteen districts but having one common centre in Manchester. The members associated are engaged in general engineering, iron shipbuilding, marine and locomotive engineering, steam boiler-making, textile machine-making, and iron and brass founding. The members of that association since the passing of the Employers' Liability Act have formed themselves into a mutual insurance company to protect themselves against losses and claims preferred against them under the Act. The following questions and answers may be quoted from his evidence :—

“4782. Do I rightly understand that in your opinion a mutual insurance amongst a number of employers is more likely to prevent irritation between employers and employed than if the insurance is confined to one works?—I beg your pardon, I do not think I follow that. My first contention is that the best kind of insurance is where the employers and employed are mutually insured by subscription in proportion to a fund.

“4783. Confined to their own works?—Confined to their own works ; so that if an accident takes place the man insured is immediately compensated according to the rules which guide the distribution of the funds, because there is no litigation, no irritation, and no difficulty of any kind arising. That I think the best possible position that the arrangement between employers and employed could take. Next to that I put the mutual insurance that we have now, simply because, although I tried with our own workmen (I got a deputation from every department) to make an arrangement such as I now suggest as the best, and although I hoped that I had succeeded when they went out of the room, from some cause or other which I cannot tell, they came back and said that they were not disposed to contract themselves out of the Act.”



Mr. Henry Bleckly, deputy-chairman of Pearson & Knowles' Coal and Iron Company, manufacturing about 2,000 tons of iron per week at Warrington and Wigan, spoke to the establishment of a fund for accidents in the establishment with which he was connected, £50 being contributed by the firm for every £100 subscribed by the men, in consideration of which there was contracting out of the Act. Q. 4530-41.

Mr. Pearce, M.P., of the well-known firm of John Elder & Co., shipbuilders, after stating that he did not advocate contracting out of the Act, made the following observations which it seems desirable to reproduce here :—

“6628. Is there anything else you would like to state to the Committee?—I would like to make one observation, and it is this: If the Committee could see their way to cover the whole of the accidents that the men are liable to by some fund, which might be instituted in such a direction as our accident fund before the Act came into operation, I think it would be a very great benefit to the workmen.

“6632. Mr. Tomlinson—I should like to ask a further question; I understand you rather to deprecate any system of mutual arrangement for contributions by the workmen and employers to a fund one condition of which should be that the contributions should be in lieu of the Act?—No, I appreciate that, but I call the Committee's attention to the fact that I would like to see, if possible, a fund, such as the accident fund I described, introduced into the Bill whereby the employers and the workmen can contribute towards a mutual accident fund that would cover all accidents.

“6633. Mr. Ainslie—I thought I understood you to say that you would not advocate contracting out of the Act?—I would not advocate contracting out of the Act, as the Act stands at present. I gave my reason for it. I said that the Act was instituted to raise the standard of care on the part of employers, and that contracting out of the Act was liable to do away with that object.

“6634. Mr. Tomlinson—Then does your opinion on that question go beyond that of adequacy of consideration? It has

been suggested that in some cases attempts have been made to induce men to contract out of the Act, the consideration being the employment itself?—My object goes beyond that altogether; my object is to prevent accidents, not to say how much money an employer is to pay for an accident.

“6635. Then supposing a mutual insurance company were established, in what position would the workman or the employers be in reference to litigation under the Act?—If a mutual insurance company were established, every man employed would be a shareholder in that institution, and it would be his aim and his interest to do everything, and to see that every care was taken to prevent any accident.”

(2) *Building and other Trades.*

Mr. M. Shipton, the secretary of the Amalgamated Society of House Decorators, as also of the London Trades' Council and the National Trades' Union Congress, made the following statement as to the objections entertained, more especially on the part of the building trade, to contracting out of the Act:—

“386. Will you briefly state to the Committee the objections which those you represent have, so far as the building trades especially are concerned, to contracting out of the Act in any trade?—The building trades with the other trades of the country for many years gave their time and many thousands of pounds in money to carry forward the agitation to obtain an Employers' Liability Act. The workmen throughout the country were animated by the sole desire of bringing home to the employers the personal responsibility of their conduct in carrying on their works. The workmen never cared for compensation itself; it might have been a necessity of their social circumstances, but no idea of compensation ever urged them forward to agitate for the obtaining of this Act; it was primarily, I may say absolutely, with the desire to protect their lives and limbs, so far as human precautions could do so, and the feeling which they have had all along is that neither insurance nor compensation, good as they may be in themselves, will ever meet their position unless the personal responsibility rests upon the employer. The other

main objection which we have to employers escaping this responsibility is that, by any outside contract between themselves and their workmen, the employers, in a covert manner, control the independence of the workmen ; that is to say, they suppress any efforts, independence which may be proper, for an increase of wages or a decrease of working hours, and seek by this occult influence to cripple the action of workpeople in this direction, by making their employment and benefits arising from an insurance fund contingent upon the caprice of their employers."

See also in his evidence Q. 418-422.

In Q. 440 the witness stated—"In my trade there is scarcely any attempt at coercion, because the employers have joined insurance societies, and found other means of meeting it" (the Act).

Mr. Stanley G. Bird, president of the Institute of Builders, chairman of the Builders' Accident Insurance (Limited), past president of the National Association of Master Builders of Great Britain, and vice-president of the Central Association of Master Builders, was examined before the Committee in connection with this question. The following answers were given by him :—

"4944. Do you take any great interest in the question of contracting out of the Act, as to the powers of reserving to employers and workmen that option?—No, we do not ; because, as a matter of fact, no builders do contract out of it ; I have only known one case of a builder attempting to contract out of the Act.

"4945. Did that succeed?—No ; at least he did not go on with it.

"4946. Then what system do the employers adopt generally?—Directly the Employers' Liability Act was passed, the builders tried to loyally carry out the Act, so far as possible, fairly and amicably with the men ; and we formed a mutual insurance company."

Mr. James Stafford Murchie, general secretary to the Amalgamated Society of Carpenters and Joiners (which is a

trade very much mixed up with the building trade), was examined. His evidence was practically to the effect that there was no contracting out of the Act among carpenters and joiners.

"1810. Mr. Tomlinson—You have had cases before you where the masters have attempted to induce men to contract out of the Act?—Yes, where they have compelled them; 'induced' is scarcely a fair way to put it, because we have had to fight them, and spent a lot of money to prevent its being forced upon men.

"1811. What was the system the employers proposed; what was the consideration for giving up your right under the Act?—At the beginning, when the Act came into force, I do not remember that they offered any alternative, beyond contracting out of one's legal rights as a condition of work; you could have no work if you did not do it.

"1812. That is not now continued?—No, I am glad to say that has gradually died out; that the employers are not now so alarmed at the Act.

"1813. Then, at the present moment, there are not many instances where employers attempt to contract out of the Act?—No, very little of them now."

Mr. William Henry Cowlin, president of the National Association of Master Builders in Great Britain, gave the following answer on the point referred to:—

"5070. What do you wish to say with reference to employers contracting themselves out of the Act?—We are content, I think, to let our mutual insurance company cover that point. We think that it is an interference, perhaps, with freedom of contract, and consequently an interference with the freedom of the subject; but it does not strike us builders very much, seeing that we have loyally carried out the Act of 1880 by starting an insurance company, and availing ourselves of the protection which it gives us."

These quotations sufficiently show that in the building and joiner trades in England the Act is substantially left to its natural operation.

Mr. Chance, corroborated by one of his workpeople, gave evidence as to the system of contracting out of the Act pursued by

the firm of Messrs. Chance Brothers, alkali manufacturers at Oldbury, near Birmingham. At the passing of the Act, 1880, there was a provident fund, but no accident fund. There are 600 workmen employed, and in five years subsequent to the institution of the accident fund there were 232 accidents. The men unanimously approved of Mr. Chance's proposal, and the fund seems to have worked satisfactorily to all concerned. The men of course, in consideration of the contribution, contracted out of the Act. The following excerpt from Mr. Chance's evidence may be given :—

“5105. And from the men's point of view you are able to say that they approve it ; they prefer it to the benefits of the Act ? —Yes. I might perhaps state what the offer was that I made to the men. I offered, on behalf of our firm, that we should contribute equally with themselves to an accident fund ; for every pound that they would pay weekly we would pay a pound ; for every £100 that they paid we would pay £100 ; so that at the end of each year the aggregate amount paid by our firm would be equal to the aggregate of the pence paid by the workpeople.

“5106. You contribute cent. per cent., in fact ?—Yes.

“5107. The principle which guided you in framing the scheme was, that masters and men should incur joint responsibility ? —That was so. Of course I felt that I was merely acting for our works. I do not wish to lay down any general rule, each work must be guided by its own circumstances ; but, in my opinion, there should be some authority in London who should control the compensation in such cases ; the compensation which might be adequate in our works might not be adequate in other works, and the compensation which I should regard as inadequate in some works, I should not like to say was inadequate in all cases. I am merely speaking of a particular case in our particular circumstances.

“5108. I see that the men contribute one penny per week to this accident fund ?—That is so. There are about 650 men ; that comes to between £2 and £3 per week.

“5109. That fund is sufficient, with the penny per week per workman from the employers ?—As a result of five years'



experience there is a balance of £800 invested on behalf of the men.

“5110. And the fund is managed by a committee, as described in Rule 4?—A committee entirely of the men, with one member of the firm as chairman; a committee of 12.”

Mr. Thomlinson, the workman referred to, spoke to the plan being highly beneficial to the men, and expressed complete satisfaction with it.

### (3) *The Railway System.*

I have in the text gone somewhat fully into the material facts of the evidence led in connection with the railway system, and therefore I do not propose to go at any great length into the matter here. Besides Mr. Findlay, the general manager, Mr. Mason, the solicitor of the London and North-Western Railway Company, was examined. The following excerpts from his evidence with reference to the other railway companies will be found of interest :—

“2668. At the last meeting of this Committee you were asked if you could obtain from other railway companies, so as to avoid bringing many witnesses here, the practice of the other companies with regard to the Employers’ Liability Act?—I have done it as far as I can; and with regard to the great Western Railway Company, they do not make any contract exempting their workmen from the provisions of the principal Act; and in 1885 only five claims were made against them. In one case only was liability admitted, and compensation to the extent of £50 was paid; no action was brought. In the other four cases liability was not admitted, and the claims were withdrawn, but gratuities were subsequently awarded, amounting altogether to £55; strictly speaking, therefore, the amount paid by the Great Western Company under the Act was £50, and with the additional gratuities, £105.

“2669. Did you go into the year 1884?—Yes. In 1884 three claims were made against the Great Western Company, in none of which was liability admitted. One action only was brought, and it was decided in favour of the company; but a gratuity

of £20 was subsequently given to the man ; and in one other case a gratuity of £15 was given ; so that in that year a total of £35 was paid by the Great Western Railway Company.

“2670. Has the Great Western Railway a pension fund?—The Great Western Company have a pension fund, a provident society, and a widow and orphans’ benevolent fund. To the pension fund the Great Western Company contribute a sum equal to the contribution of the men, and superannuated members under it receive a pension or superannuation allowance of 10s. a week ; and by another rule any member becoming permanently disabled in the employment of the company, either by accident or by infirmity of body or mind, is entitled to 4s. a week from the pension fund, and from the provident society he receives half the usual allowance of 12s., that is, 6s., which gives him 10s. a week from the two funds, until such age as he becomes entitled to the allowance from the pension fund of 10s. a week for the remainder of his life.

“2671. Have you made inquiries as to the Great Northern Railway?—Yes, I have made inquiries from the Great Northern Railway Company, and they make no contract at all exempting the men from the Employers’ Liability Act ; and taking the year ending the 31st July, 1885, they paid £655 in making up the difference between the sums received by the men from the sick fund in connection with the Great Northern Railway and the full amount of their wages ; and Mr. Oakley says, after carefully going through them, he only finds two cases which he thinks would come under the Employers’ Liability Act. He promised me the figures this morning, but I have not got them. He says the amount was small ; one was for a man who fell off a van, for which no driver’s seat had been provided ; the other was the case of a man who hurt his leg in getting down from a carriage which he had mounted for the purpose of fixing the roof lamp ; but both in the Great Western case and in the Great Northern case they have a sick fund and a provident society, and therefore in many cases the men very likely depend upon what they can get from those societies instead of bringing actions or claims against the railway companies.

“2672. In the three companies you mention, the Great Wes-

tern, the Midland, and the Great Northern, there is no attempt to contract the men out of the Act?—None whatever; I have got the figures now. The claims made in 1885 against the Midland Company were ten in number, but it may be considered as below the average. In two cases tried in the County Courts, the company disputed the liability with success; in three cases tried in County Courts, damages were obtained of £30, £151 4s., and £50 respectively; the remaining cases were settled by agreement; the company's liability in one being doubtful. Of the ten claims, four were cases of injury, six of death, and the total amount paid by the company was £512. Then the Midland Company have a friendly society, to which they contribute the sum of £9,000 per annum, the benefits of which include medical advice, sick and accident pay, and a superannuation allowance. £27,000 was paid in that year by the society under these heads.

“2673. The Midland Company contribute that large sum of £9,000 a year to the provident societies, and they do not in any way attempt to contract the men out of the Act?—No.”

I will also give the following excerpt from Mr. Findlay's evidence, in addition to what has been summarized in the text:—

“2514. Will you just now tell us, in your own way, what passed, or what step was taken by the directors of the company, in view of the passing of the Employers' Liability Act?—I gave evidence before Lord Sherbrooke's Committee in 1877, and I felt very strongly the importance, not only of keeping the men with the company, but of entering into such an arrangement with the men as would practically prevent any litigation occurring, that might, as we thought, occur under the legislation which that Committee contemplated, and, therefore, after a great deal of consideration by the directors, and consultation with the men, they agreed that the men's contributions to any new society should remain the same, the 3d., the 2d., and the 1d., and that the company should increase their contribution from £1,500 a year to 5-6ths, or something like 45 per cent. of whatever fund was formed by the men themselves.

“2515. Five-sixths of the gross amount of the members' contributions?—Of the members' contributions. Of course, when

the question arose as to common employment, which was a legal and technical question, that was very much discussed at that time (I remember some judges gave evidence before Lord Sherbrooke), we found that in the railway service the liability of the company might descend to a very low grade ; that where two men worked together, one being a foreman shunter and the other simply being a shunter, the difference being only represented by 2s. a week, the one man acting under the instruction of the other, might make the company liable, and the consequences might be a constant state of irritation and litigation between the company and their servants ; and it was to avoid that state of things, to make the men perfectly content with the service, and to make adequate provision for them, that the directors agreed to increase their contribution.

“ 2516. I want to follow this out clearly, if you please. Your object was, then, to create a state of circumstances which would make litigation, practically speaking, unnecessary between the company and their employees ?—Yes.

“ 2517. To give them substantial benefits under it, which would remove any wish to have litigation ?—Yes, and those additional substantial benefits were secured by the additional contributions that the company gave.

“ 2518. And, as far as we have gone, you did not contemplate increasing the weekly contributions of the men ?—Certainly not.

“ 2519. Have they been increased ?—They have not.

“ 2520. For this purpose, we may take it, they are still 3d., 2d., and 1d. per week, according to class ?—Yes.

“ 2572. Now you have stated that you do not believe that either the directors or the men wish for change, or think that any change is desirable ; have you considered at all any of the special proposals of the Bills which have been referred to this Committee ?—I have not paid great attention to the evidence which this Committee has had to consider ; but I should like to say that if the Act was amended so as to prevent the men from making contracts of this kind, I believe it would be impossible to continue the society in its present form ; that by no desire on the part of the company to terminate it, it would of itself naturally come to

an end, because, although we have a large number of men, between 50,000 and 60,000 men in the service, the recruiting of the service goes on constantly, and I am bound to say that in some departments it changes very quickly. We recruit to an extent of 8,000 or 10,000 men every year; so that the society, which has now 50,000 men, would, by the influx of 10,000 per year, in the course of a few years, practically die out of itself. Therefore I say that if the Act is amended in the direction which I understand these Bills point to, it would of itself, I think, kill a society of this kind.

“2573. Now, do I understand you to say that it would not, in your opinion, be possible for the company to continue the subscription if the men were prohibited from entering upon this contract?—I do not think that that question has been considered or determined upon, and I am speaking my own view. Of course the large contribution which the company has made has been to secure the men in perfect accord with the directors, and to prevent anything like disruption or disturbance, or litigation between the men and themselves. They have been willing voluntarily to pay a large sum to get that important object attained. If those advantages were taken from the company, I think it is very likely that they would hesitate about contributing so largely to any insurance society in the future.

“2574. I think the Committee would like to have your opinion upon this. In your judgment would it be desirable, having regard to such a service as the North-Western or any similar undertaking, that railway companies' servants should be prohibited from contracting themselves out of the Act?—I think it very undesirable.”

I have also in some detail referred to the evidence of Mr. Samuel Laing, the chairman of the London, Brighton, and South Coast Railway Co., in the text, but I think the following passages from his evidence may be found interesting and important:—

“2989. Can you give us the aggregate increase of expense which has been thrown upon the London and Brighton Company in consequence of their entering into this arrangement with the men; I believe the petition you have placed before us gives in



detail the increase in the benefits and payments which were paid to the men in cases of accident ; that has been increased, has it not, since the passing of the Employers' Liability Act ; to the men it has been increased, in the case of death, from £100 to £200 in the first-class claims, and from £75 to £150 in the second-class claims ; and from £50 to £100 in the case of the third-class claims ?—Yes, that is so. The original scale of the old insurance fund limited the amount to that maximum ; £100 for 6d. a month ; £75 for 4½d. a month ; and £50 for 3d. a month. When we decided, on the passing of the Employers' Liability Act, to give the men the benefit of subscribing three-fourths instead of half by the company, we thought a much better way of doing it was to encourage providence among the men by not reducing their payment, but keeping their payment the same and to double the scale.

“2990. The effect, therefore, in the men's interest, of the passing of the Employers' Liability Act has been decidedly beneficial?—No doubt ; they get a double amount of insurance for the same payment.

“2991. By the arrangement you have made you have not suffered from vexatious litigation ?—No, we get rid of all litigation because we pay without demur, no matter how it occurs. We have lost, I should think, about £4,000 a year, in a pecuniary point of view.

“2992. Practically, your objections to the proposal embodied in the Bill referred to this Committee rests upon your apprehension that if this Bill became law you would be subjected to vexatious litigation in certain cases ?—Yes. My main objection is to the difficulty in maintaining that perfect good feeling which, I believe, happily exists in the company ; it could not exist if all these cases of accidents were to become the subjects of litigation ; it is not the men themselves only, but there are a class of low lawyers always on the look-out to get cases into their hands against railway companies. I have known it carried to this extent, that when an accident has occurred to passenger trains they have offered bribes to our porters to give the names and addresses of any parties in the trains receiving injuries, so that they may go and tout for custom and bring actions against the company.

"2993. It is not at all upon the ground that you apprehend such an amount of payment as would affect your dividend, but that you apprehend vexatious litigation and interruption of the friendly relations now existing between the company and their workmen?—Yes.

"2994. That is your objection to the proposals embodied in the Bills?—Yes. Of course in a company like ours, where it requires £70,000 to pay 1 per cent. dividend, a saving of £5,000 or £6,000 a year, which is the outside of what we should save if we abolished insurance altogether, and came under the Act, is not such a large amount as to weigh for a moment, as compared with the smooth working of the system and retaining the goodwill of our men. I might add one remark, which is this, it has been suggested that the object of the Employers' Liability Act was to make the employer more careful in avoiding accidents. I may say that that would not apply to our case, because to the extent of three-fourths of the compensation paid we suffer from the accidents just as much as we should under the Act, and, in point of fact, we have adopted all the modern appliances for safety, such as the block system and interlocking points and signals, and Westinghouse brakes; and we have reduced the accidents to the public, I am happy to say, to a minimum, to an almost imperceptible amount. But the working of a railway service is like that of seamen, there is a great amount of inevitable danger in it; you cannot shunt about heavy trucks, and couple and uncouple them, without a certain number of accidents occurring. Now, it is very constantly a disputable point, was it the man's own fault, was it the fault of one of his fellow-servants, or was it an inevitable accident. I should think that five out of six cases are of that description.

"2995. There is a considerable pressure upon railway companies to act with the utmost possible care, on account of their liability to pay compensation in case of passengers, is there not?—Yes, that is a much larger question; but still, of course, from motives of humanity we are always sorry to have our servants injured, and as a mere question of pounds, shillings, and pence, if we could avoid accidents altogether, we should save the £6,000 a year we have had to contribute.

"2996. The men in your employment have petitioned against these Bills, have they not?—Yes.

"2997. And we may take it that their action has been entirely of a voluntary character?—Entirely; every man knows that he may at any moment withdraw from our insurance scheme and go upon the Employers' Liability Act, and as regards the petitions, that is absolutely and entirely voluntary; in fact, as I have said, there can be no greater mistake than to suppose that working men of that class do not know their own interest. In passing this scheme with that committee of the men every point was discussed with as much care and acuteness as it would have been in a Committee of the House of Commons. I should call it a piece of insupportable tyranny towards working-men if, in a case of this sort, they were not left free to do as they like; whether the pressure came from their employers or from legislation, I say that men of that stamp ought to be left free to make their own bargains.

"2998. Mr. A. O'Connor.—Do I gather from your evidence that the servants of your company are at liberty, if they like, to take the benefit of the Act?—They may decline the use of the insurance scheme and withdraw from their contract under it; I think at a month's notice they can come under the Act."

The following is a reference to the other railway witnesses examined. Francis Currier, foreman in goods department, London and North-Western Railway Co. (Q. 2781-2985); John Westwell, engine-driver, London and North-Western Railway Co. (Q. 2037-3115); James M'Kie, engine-driver, London and North-Western Railway Co. (Q. 3116-42); Charles Tonge, turner, London and Brighton Railway Co. (Q. 3143-57); William Hards, painter, same railway (Q. 3158-76); James Robertson, workman, London and North-Western Railway Co., an important and intelligent witness (Q. 3177-3298), all in favour of contracting out; George Samuel M'Isaac, finisher, Wolverton Carriage Works, who declined to contract out, but the following question and answer may be given:—

"3313. Has your refusal to sign operated to your disadvantage?  
— Not in the least. I may say, if I may be allowed to state it,

that I am a living denial of anything of the kind, for this very reason, that since I signed against the company I have received a promotion."

Edward Harford, general secretary of the Amalgamated Society of Railway Servants who is against contracting out. His evidence is referred to in the text. It may be that railway servants did not care to come to the Committee to speak against the system of contracting out. Mr. Harford gives a good deal of general hearsay evidence upon the point (Q. 4569-4659).

- (2.) *Letter from Mr. Pickard which appeared in the "Wigan Observer" in October, 1880, and which led to an arrangement being made as to contracting out of the Act between a large number of colliery proprietors in Lancashire and their workmen.*

*To the Editor of the "Wigan Observer."*

Sir,—Your leading article on the Employers' Liability Bill reads to me like a challenge of the views I hold as to how the new statute law will affect the bearings of masters and men in relation to the permanent relief societies. I have no hesitation in giving you my answer, but I wish it clearly to be understood that I now speak as an individual. If all be well, I expect ere long I shall be able to speak for the whole body of men in this district, but, as their officer, it will be my duty to lay my views before them, and hear what they have to say on the subject, and what is their united opinion.

You are quite right in saying that my views have only been partially met by the Bill passed by the Government. I accept what we have received with thanks, but I hope the time will soon come when every vestige of the abominable doctrine of common employment will be swept away as it has been in other countries. The working-men must never lose sight of that object,

and if they are to gain it they must be united as one man. My experience, and I am sorry to say it is beginning to be a long one, shows that the labouring classes can only obtain that protective legislation they require when by combining together they bring their united voice to bear on the House of Commons and House of Lords.

But although I hope to keep on fighting for a few years longer, I do trust that my friends and fellow-men at home and elsewhere will always remember me as a man of peace. I cannot cry, "Peace, Peace, when there is no peace"; I cannot be still when I see wrongs to be redressed, and grievances to be amended. But when the law is changed, when the protection of the statute book is secured, I have always endeavoured to help to carry out that law with as little hindrance to trade and with as little litigation as possible. Take the weighing clause in the Mines Regulation Act. Many people thought it would result in endless law, but by a little mutual forbearance we have managed to keep on a friendly footing, and without exception every dispute we have had under that clause has been settled without going into Court.

My wish is to approach this Employers' Liability Bill in the same spirit, and I believe this will be the view of the main body of the men. We have got the protection of the statute book. No master can now get rid of his liability to pay compensation in cases that come in the four corners of the Act. If they try to evade it we must fight them. If they are willing to continue on friendly terms, I hope they will not find us unreasonable.

Of course, if we are to do this, it must be on the principle of the Permanent Relief Society. I hardly need repeat what I have so often said about this noble institution. I agree with my friend, the honourable Member for Morpeth, Mr. Burt, who, in a speech at Newcastle, after the Seaham explosion, spoke in the highest terms of the similar society in the North of England. In season and out of season I have pleaded for our society. Physically, it is maintaining scores, I may say hundreds, of widows and children who would otherwise have been hanging on poor rates and charity, and morally, I believe it has done more than anything else could have done to make the masters and the



men think better of each other. When, some ten years since, I began to plead for this institution, my views were, I know, offensive to many friends of labour, who thought such funds ought to be made part and parcel of trade organizations ; but I am glad to think that their views have changed. I have never altered my opinion that it is the bounden duty of masters and men to provide for *all* accidents. There are those for which the master ought to be held liable, and the law now says he must. There are others which the man will provide for himself if he is a thoughtful being, and I cannot see why the two should not join hands and provide for all. I objected to the insurance clause, and strongly opposed its being made statute law, because I believe it would have been a weapon for abuse in the hands of bad masters ; but I do not object to insurance, for as a practical man I believe it to be necessary in mining matters, which are so dangerous.

Having said this much, I now come to what I personally think ought to be done, and may be done in all coalfields. The Permanent Relief Society ought to be looked upon as the joint insurance fund, established on a friendly basis to avoid expensive law cases. I divide the contributions into three :—

1. The payments of the masters for the proportion of accidents for which the law now holds them liable.
2. The payments of the men to provide for the accidents which they ought to hold themselves bound to make provision for.
3. The payments of both masters and men for accidents which, I am sorry to say, neither scientific nor practical men can yet account for.

The difficulty I have seen all along is how to equalize the payments, but if we could agree on the principle there would have to be some giving and taking, and we must try not to quarrel about details. From what I have heard amongst the masters I feel sure they would rather pay more to the relief society and avoid litigation than pay to a defence fund, which would be an abomination, and would certainly provoke the men to do the

same. I venture, therefore, to throw out a suggestion, open, of course, to discussion, and that is that the employers increase their payments to 25 or 30 per cent., and at the end of say three or five years, when we see how the Act works, the whole thing should be revised if either side wished it. We might agree upon some impartial person or persons to arbitrate between us, and then if we could show that the masters ought to pay more, or they could show that they ought to pay less, the arbitrator would award accordingly.

There are one or two other things I should like to see put right while we are about it. One or two colliery proprietors are only paying 10 per cent., although the society has agreed their share is to be 15. Now they ought not to have the benefit of the society or any other arrangement that may be come to unless they comply to rule.

Another point is, I think, that where a colliery year after year shows a rate of accident altogether out of proportion to the average, it ought to pay more, if the difference is not accounted for satisfactorily to the Board of Management. Depend upon it, there is either something wrong in the management or the society's business is not properly looked after.

I know this means putting a black mark against badly-managed collieries, but I believe that the good masters and the thinking men will agree that this is what the new law ought to do.

I would go further if I could, and have the master, in cases where *gross* negligence on his part is shown at the inquest, pay extra compensation to the man hurt; but, after thinking the matter over very carefully, I cannot see my way to drawing this distinction, and we must leave the criminal law to deal with such cases.

Further, let me say I have no interest to serve except to promote peace and goodwill throughout the district. I believe the old law was a bad one; I believe it has been mended, and what I want us mutually to get at is a straightforward basis which I hope to live to see adopted in every mining district, so that every man who rides a rope shall feel that, come what may, his wife and children are not to be beggars. A good deal of nonsense

has been said about ruining masters. We cannot ruin capital without ruining labour. Let capital bear its share, and labour its share, and let us above all join together to see if we cannot lessen the loss of life and injury to limb which we all deplore.

I started by saying that I am only expressing my individual opinions. I conclude in the same way, but, after nigh twenty years' experience in my present station, I have no hesitation in declaring my belief that the great body of the men hold the same views as myself on the question, and I shall certainly do my utmost to bring about what I believe to be a sound, common-sense friendly settlement.

I remain, etc.,

(Signed) W. PICKARD.

Park View, Wigan, 14th October, 1880.

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(3.) *Report by M. Treitt as to Law of France.*

*Legislation and Questions with reference to the Responsibility of Employers towards their Workmen in cases of Accidents.*

§ 1. All questions having reference to this matter are still regulated in France by common law, for none of the Bills for special laws which have been brought in during the last few years have succeeded in becoming law.

Before placing before the reader the different Bills submitted to the French Parliament since 1881, I must set forth what is the existing common law on the subject.

§ 2. The common law is formulated in the following articles of the Civil Code :—

Art. 1382. Any action whatever of a man which causes an injury to another obliges the person by whose fault the injury has occurred to repair it.

Art. 1383. Everybody is responsible for the injury he has caused, not only by his action, but also by his negligence and imprudence.

Art. 1384. A man is responsible, not only for the injury he causes by his own action, but also for that which is caused by the action of persons for whom he is answerable or of things in his charge.

The father, or the mother, after the decease of the husband, are responsible for the injury caused by their children, who live with them, being minors.

Masters and employers for the injury caused by their servants and overseers in the performance of the functions in which they have employed them.

Tutors and artizans for the injury caused by their pupils or apprentices during the time they are under their supervision.

This responsibility is incurred unless the father, mother, tutors or artizans prove that they could not prevent the action which gave rise to the responsibility.

Art. 1385. The owner of an animal, or the person using it, is responsible, so long as it is being used by him, for the injury which the animal has caused, whether the animal was in his charge or whether it had strayed or escaped.

Art. 1386. The owner of a building is responsible for the damage caused by its fall, when such fall has taken place in consequence of defective maintenance or faulty construction.

As will be seen, these principles include all cases of responsibility without exception ; the law has applied them to all circumstances in which a responsibility exists. The tribunals have every facility for establishing the responsibility either of the persons concerned, or of the things belonging to these persons. They can interrogate the parties, hear witness, make inquiries, visit the spot if necessary, and appoint experts ; in a word, the law refuses them no means of investigation to establish the truth and apportion the responsibility between employers and employed.

This common law has been in operation for nearly a century ; the Napoleonic Code dates from 1804.

Thousands of decisions have been pronounced on this matter, and I am not aware that the justice thus administered, leaving, as it does, the facts to be estimated by the conscience and intelligence of the Judges, has ever given rise to well-founded criticism. If the Judges could be suspected of partiality or indulgence, it would be in favour of the employed and not of the employers.

This procedure has only one drawback, and that a serious one : it is that the victims of accidents or their widows and children are obliged to wait a very long time before they obtain justice ; owing to the enormous number of demands for compensation, the tribunals are absolutely unable to pronounce their decisions till a long period has elapsed ; during this period the victims clearly suffer wrong ; for it is very certain that tardy justice often becomes injustice.

§ 3. It is on this account that, in considering the innovations proposed to be introduced into the law to regulate the relations of employers and employed, many French jurists believe there is nothing to be changed in the established law, which operates equitably, and that all that is wanted is to modify the procedure so that the judgment may be pronounced *without delay*, and may have a privileged position on the general list of business. This would be only a matter of internal arrangements, which could be easily brought up to the mark by the creation of new courts.

It is as well to add that victims of accidents or their representatives, who have not the means of going to law, can obtain legal assistance on proof of their indigence (Law of 22nd January, 1851) ; and in these cases they are provided with counsel gratis, and all the steps of legal procedure are taken for them free of charge.

Such is the state of things in France to-day.

§ 4. In 1881 the French Legislature, like what was happening in neighbouring countries, such as Switzerland, was called upon to examine several Bills on the subject for responsibility for accidents befalling workmen.

There were nine of these Bills, besides a dozen amendments ;



all these Bills emanated from the initiative of members of Parliament.

I annex to my report as the *first inclosure* a Parliamentary document, bearing the number 2634.

This document is the report made to the Chamber of Deputies and submitted on the 16th February, 1884, concerning all the private Bills introduced before that date in regard to the matter, as also the amendments to which those Bills had given rise. It contains all the texts as well as all the discussions which led to their acceptance or rejection by the Committee. At page 79 of the Report is to be found the draft of a Bill in thirteen Articles.

This Bill came on for discussion in the Chamber of Deputies in the sessions of the 20th, 21st, and 23rd October, 1884.

The debates were eager and animated; everybody declared himself the workman's friend; but the principle of the *absolute* responsibility of masters or employers was contested with energy. It appeared exorbitant to upset the axiom of the claimant having to prove his contention (*actori incumbit probatis*), and that the employer should be *ipso facto* responsible for all accidents, whatever their nature, and also that it should lie with him to produce the negative proof showing that he is not the cause of the accident.

In a word, the Assembly seems to have been unanimous in favour of obliging employers to take out policies for their workmen, an excellent principle in itself, but one the application of which is full of difficulties.

In its last session the Chamber decided to proceed to a second reading.

The text of the Articles voted on the first reading will be found in Inclosure 3.

§ 5. The Government had made reserves on the subject of the Articles adopted; after the session of the Chambers, it formed a strong extra-parliamentary Committee charged with preparing a Bill on this matter, with reference to which the debates had been very much confused.

On the 17th February, 1885, this Committee made its report to the Minister of Commerce, including a Bill with twelve Articles.

On the 24th of March, 1885, the Minister of Commerce introduced a Bill, in the name of the Government, on the subject of the responsibility for accidents to workmen in the performance of their work.

The Government Bill was identical with the text of the Articles voted by the extra-parliamentary Committee.

The Bill was referred to the Committee on Accidents to Workmen.

This Bill, together with the report of the extra-parliamentary Committee, will be found in the second inclosure to my report, under No. 3642.

The Legislature which had taken up the law concerning accidents to workmen in the performance of their work had terminated in July, 1885. It was, therefore, unable to finish the work it had begun.

§ 6. The new Legislature entered upon its functions in November, 1885. Conformably with parliamentary usage, it was necessary to take up again, *ab ovo*, the different Bills which were still under discussion during the foregoing Legislature.

As soon as the 5th December several Deputies brought in a Bill concerning accidents to workmen ; this Bill contained absolutely nothing beyond the self-same Articles which the preceding Chamber had voted on the first reading on the 23rd October, 1884, and which were to have been the subject of a second reading.

The text of this Bill and the text of the Articles already voted in 1884 will be found in the third inclosure to this report.

§ 7. On the 29th December, 1885, M. Rouvier resumed as Deputy the Bill which he had presented in his ministerial capacity on the 24th March, 1885, and the text of which is to be found in the second inclosure.

On the 2nd February, 1886, the Minister of the Interior presented to the Chamber of Deputies, in the name of the Government, a Bill proposing, like M. Rouvier, the adoption of the text of the extra-parliamentary Committee.

On the same day, the 2nd February, 1886, several leaders of the Conservative party submitted another Bill on the subject of accidents to workmen.

This Bill accompanies my report as a fourth inclosure.

This Bill tends towards the same end, but by different means ; it rejects the intervention of the State and leaves the protection of workmen to the combined initiative of employers and employed.

The plan deserves to be examined side by side with the proposals previously made, and its provisions will perhaps admit of being profitably adapted to the old Bills.

§ 8. All things connected with this law respecting workmen took place in the Chamber of Deputies.

The Senate had remained a stranger to it till the 26th January, 1866, on which day a Bill was submitted to it emanating from the initiative of one of its members, M. Blavier.

This document, which accompanies this report as its fifth inclosure, contains useful ideas and deserves to be considered, inasmuch as it is the work of an eminent manufacturer, and contains much that has been written on the subject.

It is doubtless true that the Senate will not be for some time called upon to pass a law with reference to accidents to workmen and the insurance by means of which they are to receive compensation ; but it seemed right that one of the great bodies of the State should not remain a stranger to the labour question. This explains M. Blavier's Bill.

§ 9. Such is the history of the laborious proposals made in regard to accidents to workmen and the responsibility which they occasion.

It only remains for me to reply to the questions put in the circular.

Hitherto the subject has been regulated by the common law, and the innovations proposed are principally concerned—

1. In imposing upon the employer the obligation to indemnify his workmen in case of accidents, even if the employer should have nothing whatever to do with the causes of the accident. This has been called "the forced contribution towards compensating professional risks."

2. In obliging employers to have their workmen insured ; these latter should bear, it is urged, at least a third of the cost of the insurance.

3. In determining beforehand the scale of compensation to be paid to the workmen or their representatives.

4. Finally, in avoiding all delays in the payment of the indemnity.

§ 10. *First Question.*—The employer is responsible with reference to all his workmen indiscriminately ; there are no classes among the workmen.

*Second Question.*—The responsibility of the employer is never absolutely relieved. If the injury arises from the act of a fellow-workman it lies with the Judge to estimate the facts absolutely, and to assign to each person his share in the responsibility.

*Third Question.*—It makes no difference if the injured workman was under the authority of a fellow-workman, or in any position of superior authority in the employer's business generally.

*Fourth Question.*—The responsibility of the employer is the same, whether the machinery, plant, and permanent appliances, or whether the acts of the workmen, or even their defaults, are concerned. The question of responsibility is always settled by the judge, who estimates the fact absolutely.

*Fifth Question.*—The workman injured is not required, as a condition of obtaining compensation, to give any special notice.

If the employer makes no offers to the workman, or if the latter does not accept his offers, the employer is summoned directly before the Judge, who decides finally if the sum in question does not exceed 1,500 francs, while the parties have a right to appeal if that sum is exceeded. This is in accordance with the common law.

*Sixth Question.*—Employers and employed are allowed to make such contracts as they please, even outside the provisions of the law ; but, according to the constant and well-established interpretation of the law, the Judges have the right to annul such contracts if they are too prejudicial to one of the contracting parties ; they are then *leonine contracts*, and are held to have been signed under irresistible constraint, such as main force or the necessity of obtaining work.

In the new proposals there is an article forbidding workmen

and employers to make contracts contrary to the provisions of the proposed law, under pain of such contracts being held null and void.

*Seventh Question.*—The right to compensation may be recorded in a contract (but this kind of contract is very rare) for the right to reparation exists in virtue of the law ; I have given, at the head of this report, the text of article 1382 of the Civil Code, which compels the author of a voluntary or involuntary action which has occasioned an injury to another to repair that injury.

*Eighth Question.*—It is to be regretted that the system of insurance by workmen themselves does not much prevail. In France insurance has not yet become general as in some other countries.

If workmen insure themselves against accidents it is generally through the intermediary care and assistance of the employers ; in this respect the improvidence of workmen is proverbial in France.

*Ninth Question.*—There is nothing fixed and determined as to the proportion in which employers and employed respectively contribute to the insurance fund. The proportion generally varies from 1 to 5 per cent., according to the more or less numerous chances of accident by which the employed are threatened.

Every year the employed set aside a certain sum from their income under general expenses, in order to subvention the workmen's insurance fund. There are no fixed rules in this respect ; the sums set aside from their wages by the workmen vary in the different establishments, as in the case of the sums contributed by the employers.

*Tenth Question.*—The employer cannot reduce his responsibility to a fixed sum, for, in default of payment from the insurance fund of the compensation due or assigned under the contract, the employer may be sentenced to pay the compensation if he is covered by the provisions of article 1382 of the Civil Code.

*Eleventh Question.*—The responsibility of shipowners, in case of injury to the sailors employed by them, is the same as that of employers in general ; they are subject to the common law.

*Twelfth Question.*—There are no special provisions in the case of shipping, as regards the responsibility of employers.



*Thirteenth Question.*—The responsibility of shipowners exists indiscriminately as regards French sailors and sailors of foreign nationality.

I annex to this report a few books and documents which will enable the reader to reach the bottom of this question, which has raised much controversy in France, especially on the part of the Chambers of Commerce and Industry.

I have in my possession other papers, among others the Parliamentary Debates ; I have thought it advisable not to include them in this report, in order to avoid making the study of the question more complicated ; but they are at the disposal of the reader.

TREITT.

PARIS, *April* 18, 1886.

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(4.) *Report by Mr. Leveson-Gower as to Law of Germany.*

BERLIN, *May* 7, 1886.

The liability of employers to compensate workmen injured in their service depends on special legislation, the first law passed on the subject being the “*Haftpflichtgesetz*” (Law relating to the liability of employers to pay compensation to persons injured in their service or in their trade) promulgated on the 7th June, 1871. This law was passed, not only for the benefit of workmen, but for the benefit of all persons injured by the working of railways, mines, quarries, and manufactories.

By the “*Haftpflichtgesetz*,” any person injured on a railway, or in the railway service, was entitled to a compensation from the railway direction, unless the said railway direction could prove satisfactorily that the accident had been caused by circumstances over which it, as an employer of labour, could have no control (“*höhere Gewalt*”), or by the fault of the injured person himself ; also by this law any person injured by the working of a mine, quarry, or manufacture, was entitled to compensation from the owner of such mine, quarry, etc., provided the person injured

could prove that the injury had been caused by the negligence of the owner, or of a functionary in a position of authority in the owner's service.

The above law, "Haftpflichtgesetz," although not formally abrogated, has practically been superseded, as far as workmen are concerned, by the "Unfallversicherungs-Gesetz" of 6th July, 1884.

This law, which has been in force since the 1st October, 1885, imposes on the employer the obligation—

- (a) To compensate workmen injured in his service.
- (b) To pay a pension to the widows of workmen killed in the service.
- (c) To maintain the children of workmen killed in the service till they have reached a specified age.

The effect of the law has been that employers, for their own protection and in order to spread their risks over as large an area as possible, have been grouped by law into trade associations, termed "Berufsgenossenschaften."

The statutes of each such "Berufsgenossenschaft" must receive the sanction of the Government.

Each branch of trade or industry in which the risks are similar and equal (for instance the iron and steel trade, chemical industry, textile industry, sugar, or tobacco manufactories, etc.), has been formed by law into a "Berufsgenossenschaft" for each such branch of industry within a certain geographical district, for the purpose of compensating workmen injured in the service of any employer who belongs to the respective district, and belongs therefore by law to the respective Association.

Some branches of industry (for instance the chemical industry, gas and water companies, etc.), have formed only one "Berufsgenossenschaft" for the whole of Germany. Some other branches (the iron and steel trade, for instance) have formed several "Berufsgenossenschaften," each of them for a certain geographical district.

The total number of these "Berufsgenossenschaften" is at present 62, each having its own administration.

By means of this organization, if a workman in the iron and steel trade (to take an instance) is injured in the service of his employer, those employers who are banded together in the "Eisen und Stahl Berufsgenossenschaft" are under legal obligations to pay the compensation for the injury received, and out of the total number of eight "Berufsgenossenschaften" formed for this particular trade, those employers are liable who form that "Berufsgenossenschaft" in whose district the manufactory of the employer concerned is situated.

The funds for compensating injured workmen and the costs of administration are raised yearly from all the employers within the respective districts, in proportion to the wages paid by each employer to his workmen during the year.

The above law (Accidents Insurance Law) was extended by the Law of 28th May, 1885—

First. To all workmen employed in the post, telegraph and railway services.

Secondly. To the trades carried on by the administration of the Army and Navy.

Thirdly. To inland navigation, the working of dredges, ferries, and rafts, to the transport of passengers and forwarding of goods, to the loading, unloading, and warehousing of goods, to cellarage, and the like.

The principles of the Unfallversicherungs-Gesetz (Accidents Insurance Law) of 6th July, 1884, have been extended to all agricultural and forest labourers by a law of 5th May, 1886. The day, however, on which this law will be put into force is not yet fixed.

Such are the main principles of the Accident Insurance Law of Germany, which are simple enough in themselves, the difficulty and complexity lying in their application and enforcement. The time since the Act came into force (October, 1885) has been too short to enable the employers to know how their organization will work, and utterly insufficient to calculate what will be the expense either of management or of compensation.

The following are the answers to the questions in Lord Rosebery's Commercial Circular of the 30th March, taken in their order:—

1. The liability of employers comprises—

First. All workmen employed in manufactories, mines, quarries, forges, wharves, and in the building trade.

Secondly. All workmen employed as masons, carpenters, tilers, stone-cutters, chimney-sweeps, or in well-digging and pump-making.

Thirdly. All workmen employed in a trade in which boilers or machines driven by elementary power (wind, water, steam, gas, hot air, etc.) are used.

Fourthly. All persons employed in the industries or trades above-mentioned who are not workmen, properly so called, but functionaries receiving a fixed salary not exceeding 2,000 marks per annum.

All persons included under these four headings are entitled to compensation when injured at their work, or, in other words, they are insured by law (*ipso jure*) against accidents suffered at their work (Betriebsunfälle).

Only such persons as are employed in offices as clerks, book-keepers, and the like, and who, consequently, have nothing to do with the practical work, are exempted from this law.

N.B.—Officials appointed by the Government (of Germany or of a German State), or by a public community, who receive a fixed salary, and are entitled to a pension from the Government or from a municipality or other public community, are not affected by this law.

Such officials, as far as they are employed in a trade or manufactory ("Betrieb") affected by the "Accidents Insurance Law," are entitled to a pension from the Government when they become unfit for service by an accident suffered in such employment, according to the provisions of the "Gesetz betreffend die Fürsorge für Beamte und Personen des Soldatenstandes infolge von Betriebsunfällen," or Law to provide for officials and persons in the military service in case of accidents (15th March, 1886).

2. The only cases in which the employers would be relieved from liability are—1st, When the injury suffered by the workman has no connection at all with the execution of his duty in his practical work, as for instance when a workman is injured

by a fellow-workman in a quarrel ; or 2ndly, where a workman is convicted of wilfully injuring himself, or of wilfully causing the accident by which he has been injured, and thereby loses all claim for himself or for his family for compensation.

3. It makes no difference whether a fellow-workman is in authority over an injured workman or not ; but, should the accident have been caused by gross and criminal neglect on the part of the employer or of one of his working managers, and should this opinion be confirmed by the verdict of a criminal court, then the compensation is also paid out of the funds of the Trade Association ("Berufsgenossenschaft"), but the incriminated employer or manager, as the case may be, is bound by law to repay to the Berufsgenossenschaft the amount disbursed for the workman injured.

Even in this case it will be seen that the workman has no direct claim against his employer.

4. As far as responsibility is concerned, there is no difference between the liability of employers for the condition of machinery, plant, and permanent appliances of the work, and his liability for specific acts or defaults of his workmen.

5. The employers are obliged by law to settle the claims of an injured workman *ex officio*, without a special notice being given by the workman injured.

If for any reason the employers have omitted to settle such claim, the workman injured is bound to give notice of his claim within two years of the time of receiving his injury, otherwise he would (with some exceptions) lose his claim.

6. Employers individually, and as Trade Associations ("Berufsgenossenschaften"), are positively forbidden by law to restrict by contract or otherwise the rights and claims given by the law to their workmen.

All stipulations of such a kind would be null and void.

7. The right to compensation is not treated as arising out of the contract between employers and employed, but rather as a right of a public character, arising out of a natural obligation of the employer to compensate workmen injured in his service.

8. The liability of the employer begins from the fourteenth



week after the accident. For the first thirteen weeks the injured workman is supported by the funds of the "Krankenkassen" (sick funds).

According to the "Krankenversicherungsgesetz" (15th June, 1885), contributions to sick funds are compulsory. To these funds the employer contributes in the proportion of *one third*, the workmen of *two thirds*.

9. The employed do not contribute in any way or manner, either voluntarily or otherwise, to the funds out of which their *insurance against accidents* ("Unfallversicherung") is paid, and therefore in no way to the benefit conferred upon them by the law, except in so far as they are bound by law to contribute, as above stated, to the "Krankenkassen" (sick funds), which support them for a period of thirteen weeks after the injury has been received.

In the case of a workman dying in consequence of an accident, his funeral expenses are paid by that "Berufsgenossenschaft" of which his employer is a member, his widow and children receiving a pension in proportion to the wages he was earning when alive.

10. The employer can in no way reduce his liability, but in order to reduce as far as possible the payments which this liability must entail upon him, he is associated by law into a "Berufsgenossenschaft" (Trade Association) with his fellow employers who carry on trades allied to his own, and in which the risks are similar to his own.

Such an association and its statutes of organization must receive the assent of the Government. By means of such associations, the number of the employed, subject to the same or similar risks, becoming large (each Berufsgenossenschaft containing on an average from 30,000 to 40,000 men), the risks are spread over a larger basis, and the average of accidents, as compared with the number of the employed, is reduced.

11, 12, 13. As yet there are no legal provisions respecting the liability of shipowners for injuries suffered by sailors in their employ. But a law is being prepared at the present moment in order to extend the principles of the "Unfallversicherungsgesetz" to this class.

For the time being shipowners have only to provide for sailors in case of illness for a certain time (three to six months) (Seemannsordnung vom 27 December, 1872, § 48).

This law applies to sailors of all nationalities in the ship-owner's employ.

The above laws hold good for the whole German Empire, and over-rule or abrogate special laws in the individual States.

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(5.) *Bill laid before the Italian Chamber of Deputies on 1st June, 1885, and at date of Report to Lord Rosebery (April, 1886) under examination by Committee appointed to report upon it.*

#### *National Workmen's Pensions Act.*

Art. 1. A National Fund for Workmen's Pensions is established by means of special autonomous funds according to the terms of art. 3.

Art. 2. Citizens of both sexes may be inscribed on this fund, if they are fifteen years of age, and exercise manual labour or work, by the job or by the day ; also the widows and orphans of workmen who have suffered misfortune, and received an indemnity from the National Fund of Insurance against Accidents.

Art. 3. The several pension funds are formed in conformity with the present law, by the ordinary savings bank, specially authorized for this purpose by Government.

Art. 4. In order to maintain the above-mentioned authority each savings bank must institute within itself a pensions fund with a guarantee fund devoted thereto of not less than £2,000.

Two or more savings banks may unite to form a society for working a pensions fund at a central office, provided that they together make up a guarantee fund as above.

Art. 5. The fund may be worked by the usual staff of the establishment, but must be audited by a separate administration.

The administrative staff of a fund worked by a society must be approved by Government. The society will not be responsible beyond the guarantee fund established in the preceding article, saving the personal responsibility of the administrators.

Art. 6. Each establishment or society will receive inscriptions only at the place authorized by Government, but may perform its operations with the persons inscribed and pensioned in all parts of the country.

Art. 7. The persons indicated in art. 2 may inscribe themselves on any fund whatsoever. Each person inscribed will receive a book in his name, and with the necessary indications for recognizing his identity.

When the pension has been liquidated the said book must be returned to the bank and substituted by a pension book.

In case of loss a duplicate of these books may be given under the usual cautions.

Art. 8. The pensions funds consist of :—

- (a.) The fees for inscription.
- (b.) The payments of, or on behalf of, the persons inscribed.
- (c.) The interest on the capital invested.
- (d.) The accumulated capital and interest to the credit of persons who die before having the right to a pension and without heirs, etc.

The Government assigns to each fund an annual and an eventual subsidy, formed by two-tenths on the net profits of the Postal Savings Banks, on the profits derived from "judicial deposits," and by certain sums accruing from unexchanged State paper money and ecclesiastical funds.

These subsidies will be divided amongst all the pensions funds in proportion to their respective number of depositors.

Art. 9. The capital and revenues of the pensions funds, excepting the sums required for the purchase of offices, must be invested exclusively in Italian National Debt bonds, in bonds guaranteed by the Government, in Italian Treasury bonds, in loan and deposit bonds, or in Italian Land Credit bonds. All other real or personal property accruing to the said funds must

be converted into cash within five years and invested as aforesaid.

Art. 10. Inscriptions to the funds are made on demand and on payment of a fixed tax of two lire which may be made by a third person with the consent of the interested party, the admissibility of the demands being decided upon by the administrations of the funds, without appeal.

Art. 11. Depositors acquire a right to a pension on completing the fiftieth year of their age ; but they may postpone the use of this right until the completion of their sixty-fifth year, continuing their deposits until that period.

Art. 12. Each depositor has a single individual account. He may at any time withdraw from the fund and obtain the restoration of the capital and interest<sup>1</sup> accumulated to his credit, but without the Government subsidy, the amount of which goes to swell the sum divisible amongst the remaining depositors.

Art. 13. The deposits of persons who die before attaining the right to a pension, must with the interest thereupon be repaid to their successors, but without the Government subsidy, which is disposed of as in the preceding article.

By *successors* are understood the legitimate heirs, according to art. 721 of the Civil Code, and the testamentary legatees.

Art. 14. Depositors who have met with very severe misfortune (or accident) may withdraw their deposits, together with the interest and the Government subsidy.

Art. 15. Each deposit may not be less than 50 centimes, nor may the deposits of each person exceed 200 lire (£8) per annum.

The deposits may continue to be made up to the date when the pension is liquidated.

With the consent of the person interested deposits may be made in his favour by third persons, corporations, or voluntary associations.

In this case a first deposit of over 200 lire may be made per individual.

Art. 16. Provides for the formation of a reserve fund out of the annual revenues of each pensions, and after the deduction of the fixed expenses and costs of administration. To this reserve

<sup>1</sup> Interest at 5 per cent.

will also belong the fees for inscription, the surplus of pensions arising from the death of depositors, the eventual Government subsidy, and gifts, legacies, etc., made without any particular destination.

Art. 17. Provides for the employment of surplus annual revenues by assigning them to the depositors' accounts when they have made deposits of not less than 6 lire per annum ; including the Government subsidies rendered available by the death of depositors or the withdrawal of deposits as above-mentioned, and the yearly State subsidy. Such surplus may not exceed 50 lire (£2) for each depositor, the remainder going to the reserve fund.

Art. 18. On reaching the prescribed age each depositor has a right to—

- (a.) A fixed pension determined by appropriate tables and corresponding to his age and the amount of capital accumulated to his credit ;
- (b.) To a fixed pension corresponding to a portion, at his choice, of the accumulated capital, together with the interest on the remaining capital invested in Italian Public Funds or Land Credit bonds, kept in charge of the pensions fund, and becoming the property of the successors.
- (c.) To the interest on the entire accumulated capital invested, etc., as in the preceding paragraph.
- (d.) To the withdrawal, without pension, of the entire accumulated capital with the interest thereon, and the State subsidy added thereto.

Art. 19. The pensions cannot be sequestrated nor alienated ; they can be demanded by deputy in case of illness attested by medical certificate, or of impediment attested by the certificate of the Syndic of the Commune inhabited by the depositor, and in case of his absence from places where offices of the pensions fund exist.

In case of dispute before the law courts as to the amount of a pension, the claimant will have the benefit of legal assistance gratis.



Art. 20. Each pensions fund office may open with the deposit and loan fund a reserve account to contain the reserves guaranteed on each pension account when the pensioner dies with a surplus in his favour.

Every five years each pensions office will audit its accounts with the deposit and loan office.

Art. 21. Each pensions office must send in an annual account of all its operations to the Ministry of Agriculture, Industry, and Commerce, with a special demand for reimbursement, in case of an excess of expenditure, signed by at least two administrators, including the director. Such reimbursement will be allowed by the Ministry from the deposit and loan fund.

Art. 22. The pensions offices may make use of the Post Office Savings Banks for the performance of their ordinary operations.

Art. 23. The pensions funds enjoy the same fiscal exemptions according to the ordinary savings banks. They are all exempt from all registration, stamps, certificate, and documentary taxes.

Art. 24. The execution of the law will be provided for by a regulation to be approved by Royal Decree on the advice of the Council of State.

In the preamble of this Bill it is observed that the principle of workmen's pensions insurance *by the State* has not yet been received with much favour by public opinion in Italy, nor has it been recognized as sufficiently easy of adoption to give hopes of good results.

With regard to the amount of the guarantee fund (Art. 4), viz., £2,000, it is considered sufficient to guarantee operations to the extent of at least £20,000, and the reserve fund to be subsequently substituted for the guarantee fund (Art. 16) is never to be less than one-tenth of the total amount of the capital to the credit of the depositors and pensioners.

As to the eventual Government subsidy (Art. 8), it is mentioned that the time cannot yet be determined when such subsidy will be given; it will be composed of sums corresponding to the State paper money called "*biglietti consorziali provvisorii e già consorziali*," which shall not be presented for exchange according to the terms of the existing law for the abolition of the forced currency, and of the surplus, up to £800,000 of the revenue

of the Ecclesiastical Funds, belonging to the State in accordance with the Law of the 7th July, 1866.

The annual Government subsidy is to be formed of two-tenths of the net profits of the Post Office Savings Bank, which amounted in 1883 to 589,843 fr. (so that the two-tenths of this sum would amount to nearly 118,000 fr.=£4,720), and of the net profits derived from the employment of "judicial deposits," which in 1883 amounted to 104,000 fr.=£4,160.

(6.) *The following was handed to the Committee by Mr. Sheriff Lees in connection with the proposal to institute Jury Trials in the Sheriff Court for the disposal of Claims under the Employers' Liability Act.*

PROPOSED ADDITIONAL CLAUSES TO EMPLOYERS' LIABILITY ACT  
(1880) AMENDMENT BILL.

XI. From and after the passing of this Act it shall be lawful for any party claiming compensation, or from whom compensation is claimed under the said Employers' Liability Act, 1880, or any Act amending the same, in the Sheriff Courts of the counties of Midlothian, Lanark, Renfrew, and Aberdeen, to have such claim disposed of by a Sheriff and jury, provided the sum sued for exceeds fifty pounds; and the following shall be the procedure in such event :—

(1.) Any party desiring to have such claim disposed of by a jury shall, within eight days after an interlocutor has been pronounced in the cause allowing a proof, lodge a notice with the Sheriff-Clerk to the effect that he desires to have the case tried by a jury; and he shall at the same time send notice by registered letter to the same effect to the agent on the other side.

(2.) The Sheriff-Clerk shall forthwith lay the process in the cause before the Sheriff, and the Sheriff shall send the case to an early roll (but not sooner than fifteen days from

the date of the interlocutor allowing a proof), and appoint parties to lodge the issue or issues which they propose for the trial of the cause ; and after hearing parties he shall determine whether the cause shall be taken before a jury or be disposed of in the manner heretofore in use.

(3.) If the Sheriff shall be of opinion that the case should be taken before a jury he shall, without further adjournment, proceed to adjust issues for the trial of the cause, and, as soon thereafter as may be, pronounce an interlocutor settling the same.

(4.) Any interlocutor pronounced under sub-section 2 shall be final, and not subject to review ; but it shall be competent for either party to appeal to the Sheriff-Principal against the form of the issues settled by the Sheriff-Substitute, and such appeal shall be made in the manner and under the conditions provided as to interlocutory appeals by "The Sheriff Courts (Scotland) Act, 1876."

(5.) Nothing herein contained shall affect the right of either party to appeal to the Court of Session for jury trial in so far as the same is at present competent.

(6.) The jury shall consist of six common and three special jurors, chosen in the manner set forth in the forty-fourth section of "The Court of Session Act, 1868" ; and the Sheriff-Clerks of the said several counties, or their deputies, shall cite juries for trials under this Act.

(7.) A jury may at any time, being not less than one hour after it was enclosed, return a verdict by a majority of its number.

(8.) The remuneration to be allowed to juries empannelled for the trial of any claim made under this Act shall be at the rate of five shillings to each juror for each day or part of a day that the trial shall last, exclusive of his necessary travelling expenses.

(9.) Sections 34, 35, 36, 37, 38, and 39 of the "Court of Session Act, 1868," shall apply *mutatis mutandis* to the trial of actions under this Act by the Sheriffs of the said several

counties and a jury. The word "Court" in said sections, and in the Acts referred to in said sections, shall mean either Division of the Court of Session ; and the word "counsel" shall mean, so far as regards the conduct of the cause in the Sheriff Court, the enrolled law agents practising before such Sheriff Courts. Provided always, that any motion or other application made under the sections incorporated as aforesaid shall be competent only if made within ten days from the date of the verdict being returned, and if made with the view of obtaining the judgment of either Division of the Court of Session, in which event the Sheriff-Clerk shall thereon transmit the process to such Division in the manner in which processes are in use to be transmitted in ordinary appeals against judgments pronounced on the merits of a cause in the Sheriff Court.

(10.) "Sheriff" shall include "Sheriff-Substitute," except where otherwise provided.

XII. The Sheriff-Principals of the said several counties of Midlothian, Lanark, Renfrew, and Aberdeen shall, as soon as may be after the passing of this Act, frame rules for regulating the procedure as to the summoning of juries, and the scale of fees, and all other matters necessary for carrying this Act into execution, which rules shall be submitted to the Lord President of the Court of Session, and when approved by him shall be binding on all concerned ; and such rules may, with authority aforesaid, be revised or altered from time to time.

XIII. And whereas, since the passing of an Act in the sixteenth and seventeenth years of her Majesty's reign, chapter 80, by which it was provided that the salaries granted to the Sheriff-Substitutes of Scotland should not in any case exceed £1,000, nor be less than £500 by the year, the work of the Sheriff-Substitutes of the said counties of Midlothian, Lanark, Renfrew, and Aberdeen has, through the growth of population and the enactments contained in numerous statutes, been largely increased, and will by the provision of this Act in regard to jury trial be further much increased, and it is proper that provision should be made for their suitable remuneration in respect

thereof, and that where there are more Sheriff-Substitutes than one holding Courts in the same town of said counties they should each receive the like salary ; be it enacted that it shall be lawful to grant to the Sheriff-Substitutes of the said counties of Midlothian, Lanark, Renfrew, and Aberdeen such salaries, not exceeding the sum of £1,500 nor less than £1,000 by the year, as to the Lords Commissioners of Her Majesty's Treasury shall seem meet, having regard to the amount of work in the respective Courts of the said counties during the last ten years.



## LIST OF ABBREVIATIONS OF REFERENCES.

<i>Abbreviations.</i>	<i>Names of Reporters and Reports.</i>
A. & E. - - -	Adolphus & Ellis.
B. & C. - - -	Barnewall & Cresswell.
Bing. - - -	Bingham.
B. & S. - - -	Best & Smith.
C. B. - - -	Common Bench Reports.
C. B. N. S. - - -	Common Bench Reports, New Series.
Ch. D. - - -	Law Reports, Chancery Division.
C. M. & R. - - -	Crompton, Meeson & Roscoe.
Coke's Rep. - - -	Coke's Reports.
C. P. D. - - -	Law Reports, Common Pleas Division.
C. & P. - - -	Carrington & Payne.
D. - - -	Dunlop.
D. & L. - - -	Dowling & Lowndes.
D. P. C. - - -	Dowling's Practice Cases, Old Series.
E. & B. - - -	Ellis & Blackburn.
E. & E. - - -	Ellis & Ellis.
Ex. or Exch. - - -	Exchequer Reports by Welshy, Hurlstone & Gordon.
Ex. D. - - -	Law Reports, Exchequer Division.
F. & F. - - -	Forster & Finlason.
H. L. C. - - -	House of Lords Cases, by Clark.
H. & N. - - -	Hurlstone & Norman.
Jur. - - -	Jurist.
L. J. C. P. - - -	Law Journal Reports, Common Pleas.
L. J. Ex. - - -	" " Exchequer.
L. J. M. C. - - -	" " Magistrates' Cases.
L. J. Q. B. - - -	" " Queen's Bench.

# 594 LIST OF ABBREVIATIONS OF REFERENCES.

<i>Abbreviations.</i>	<i>Names of Reporters and Reports.</i>
L. R. App. Cases. -	Law Reports, House of Lords and Privy Council.
L. R. C. P. - -	„ Common Pleas.
L. R. Ex. - - -	„ Exchequer.
L. R. H. L. Sc. App. -	„ House of Lords, Scotch Appeals.
L. R. Ireland. - -	„ Ireland.
L. R. Q. B. - - -	„ Queen's Bench.
L. T. or L. T. N. S. -	Law Times Reports, New Series.
Macp. - - -	Macpherson.
MacQ. or M'Q. - -	MacQueen.
M. & R. - - -	Manning & Ryland.
M. & W. - - -	Meeson & Welsby.
Q. B. - - -	Adolphus & Ellis, Queen's Bench Reports.
Q. B. D. - - -	Law Reports, Queen's Bench Division.
R. - - -	Rettie.
R. (Just. Cases). -	Rettie (Justiciary Cases).
S. L. R. - - -	Scottish Law Reporter.
Scot. Law Rev. - -	„ „ Review (also referred to as Sheriff Court Reporter).
Tyr. - - -	Tyrwhitt.
W. R. - - -	Weekly Reporter.

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